

No. 94-1511-CFX
Status: GRANTED

Title: Samuel A. Lewis, Director, Arizona Department of
Corrections, et al., Petitioners
v.
Fletcher Casey, Jr., et al.

Docketed:
March 14, 1995

Court: United States Court of Appeals for
the Ninth Circuit

Counsel for petitioner: Struck, Daniel P., Phillips, Carter G.

Counsel for respondent: Bendheim, Alice L.,
Alexander, Elizabeth

Entry	Date	Note	Proceedings and Orders
6	Apr 14 1994	C	Application (A93-851) for a stay of permanent injunction of United States District Court of Arizona, submitted to Justice O'Connor.
7	Apr 18 1994		Response to application (A93-851) from Fletcher Casey, Jr., et al. requested by Justice O'Connor, due April 26, 1994.
8	Apr 18 1994		(A93-851) Justice O'Connor issued a temporary stay pending the receipt of a response and further order of herself or of the Court.
9	Apr 26 1994		Response to application (A93-851) filed by Fletcher Casey, Jr., et al..
10	Apr 26 1994		Application (A93-851) referred to the Court by Justice O'Connor.
11	May 2 1994		(A93-851) ORDER: The application for a stay of the enforcement of the injunctive order of the United States District Court for the District of Arizona, case Nos. 90-0054 and 91-1808, issued October 13, 1993, presented to Justice O'Connor and by her referred to the Court is granted pending timely filing and disposition by this Court of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. Justice Blackmun, Justice Stevens, Justice Souter and Justice Ginsburg would deny the application.
1	Mar 14 1995	G	Petition for writ of certiorari filed.
2	Apr 13 1995		Brief amici curiae of California, et al. filed.
3	Apr 14 1995		Brief of respondents Fletcher Casey, Jr., et al. in opposition filed.
4	Apr 19 1995		DISTRIBUTED. May 12, 1995 (Page 1)
5	Apr 19 1995	X	Reply brief of petitioners filed.
12	May 15 1995		REDISTRIBUTED. May 19, 1995 (Page 13)
13	May 22 1995		Petition GRANTED. *****
15	Jun 5 1995		Order extending time to file brief of petitioner on the merits until August 7, 1995.
16	Aug 2 1995		Order further extending time to file brief of petitioner on the merits until August 14, 1995.
17	Aug 4 1995		Brief amicus curiae of Criminal Justice Legal Foundation

2/19/95

Entry	Date	Note	Proceedings and Orders
			filed.
19	Aug 7 1995		Brief amici curiae of Washington Legal Foundation, et al. filed.
18	Aug 14 1995		Brief amici curiae of National Conference of State Legislatures, et al. filed.
20	Aug 14 1995		Joint appendix filed.
21	Aug 14 1995		Brief of petitioners Samuel Lewis, et al. filed.
22	Aug 14 1995		Brief amici curiae of California, et al. filed.
24	Aug 25 1995		Order extending time to file brief of respondent on the merits until September 29, 1995.
25	Sep 5 1995	P	Motion of respondents to strike Appendix A to brief of petitioners filed.
26	Sep 18 1995		Letter from counsel for the petitioner received and distributed.
29	Sep 26 1995		Brief amici curiae of Mexican American Legal Defense, et al. filed.
30	Sep 28 1995		CIRCULATED.
31	Sep 29 1995	X	Brief amicus curiae of United States filed.
32	Sep 29 1995	X	Brief of respondents Fletcher Casey, Jr., et al. filed.
33	Sep 29 1995	X	Brief amicus curiae of Legal Aid Bureau, Inc. filed.
34	Sep 29 1995	X	Brief amicus curiae of Prisoners in Northern California Class Actions filed.
35	Sep 29 1995	X	Brief amicus curiae of Prison Legal Services of Michigan filed.
36	Sep 29 1995	X	Brief amicus curiae of North Carolina Prisoner Legal Services, Inc. filed.
37	Oct 3 1995		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 29, 1995. (1ST CASE)
38	Oct 30 1995	X	Reply brief of petitioners filed.
39	Nov 16 1995		Record filed.
		*	Original record proceedings United States District Court for the District of Arizona (4 BOXES)
40	Nov 16 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
41	Nov 27 1995		LODGING consisting of ten copies of 1995 Arizona Session Laws and ten copies of Arizona Revised Statutes, ch.288, Sect.35-152 submitted by counsel for the respondents.
42	Nov 29 1995		ARGUED.

941511 MAR 14 1995

No. _____

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SAMUEL LEWIS, *et al.*,
Petitioners,
v.

FLETCHER CASEY, JR., *et al.*,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court's order in this "access to courts" case, which greatly expanded the State of Arizona's financial and administrative burdens and shifted much of the management of the state's prison system to the federal judiciary, exceeds the constitutional requirements set forth in *Bounds v. Smith*, 430 U.S. 817 (1977).

LIST OF PARTIES

Petitioners are the following prison officials of the Arizona Department of Corrections: Samuel A. Lewis, Director; Robert Goldsmith, Arizona State Prison Complex, Florence; Warden William Rhode, Arizona State Prison Complex, Perryville; Warden George Herman, Arizona State Prison Complex, Douglas; Warden Roger Crist, Arizona State Prison Complex, Tucson; Warden Hal Cardin, Arizona State Prison Complex, Phoenix.

Respondents include twenty-two class representatives, on behalf of themselves and all other similarly situated inmates in the Arizona Department of Corrections. The twenty-two representative plaintiffs are Fletcher Casey, Jr., Stephen James, Frank Bartholic, Armando Munoz, Kyle Baptisto, David A. Mann, Jeffrey Lustig, Terry Don McFalls, Randy Sampson, John Tomlin, Scott Tramosch, Pamela McQuillen, Carolyn Ferguson, Yvonne Martin, David Tucker, Susan Colker, John Myers, Mary Jo Booker, Randy Thomas, Ruth Johnson, Roman Stone, and Robert Bankston.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. _____

SAMUEL LEWIS, *et al.*,
v. *Petitioners,*

FLETCHER CASEY, JR., *et al.*,
Respondents.

**Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

The Arizona prison official petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the court of appeals (Appendix A) is reported at 43 F.3d 1261. The opinion of the district court (Appendix B) is reported at 834 F. Supp. 1553; the district court's October 13, 1993 permanent injunction (Appendix C)¹ is unreported, but was stayed

¹ Because the district court's injunction includes voluminous appendices irrelevant to this petition, they have not been included in the appendix hereto.

by this Court in an order published at 114 S.Ct. 1638 (Appendix D).

JURISDICTION

The court of appeals rendered its judgment and opinion on December 27, 1994 (Appendix A). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment states in pertinent part as follows:

[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a prisoner "access to the courts" class action against the Arizona Department of Corrections ("ADOC"), its director, and administrators, alleging, *inter alia*, that ADOC unconstitutionally denied respondents meaningful access to the courts. The District Court for the District of Arizona had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(3) and 2201.

After a bench trial, Hon. Carl A. Muecke, District Judge for the District of Arizona, ruled in the respondents' favor. He appointed a special master to design a legal access program, which the court adopted in its entirety in an October 13, 1993 order of permanent injunction.²

² In its order appointing the special master, the district court required ADOC officials to deposit *at least \$5,000 A MONTH* in a bank account maintained for use by the special master and his assistant. (Appendix E). This account was reserved solely for the special master's costs, such as travel and office expenses. The special master and his assistant have billed ADOC nearly \$12,000 PER MONTH in fees and costs while monitoring compliance.

After unsuccessfully requesting both the district court and the court of appeals to stay the injunction, petitioners requested this Court to do so. This Court granted the stay, pending the timely filing of this petition for writ of certiorari. *Lewis v. Casey*, 114 S.Ct. 1638 (1994) (Appendix D).

The Ninth Circuit affirmed the injunction in pertinent part.³ Specifically, the court upheld the district court's conclusion that ADOC was required, under *Bounds v. Smith*, 430 U.S. 817 (1977), to:

- Open petitioners' law libraries between 50 to 80 hours per week, including night and weekend hours, regardless of demand;
- Provide fully equipped law libraries at every prison unit with a capacity of 150 inmates;
- Hire full-time, professionally trained librarians with law or paralegal degrees for every law library;
- Provide extensively trained inmate legal assistants to all inmates, even if the inmates are literate and have physical access to a law library;
- Provide a legal assistant training program, including a legal research course of approximately 60 hours in length to be taught by lawyers, law students, or trained paralegals at each law library twice a year, *ad infinitum*;
- Provide a weekly minimum of three 20-minute telephone calls to an attorney, an attorney representative, or a legal organization;

³ The court vacated in part and remanded in part on issues not directly relevant to this petition. The issues remanded concerned the \$46 indigency standard imposed by the district court, the proper copying cost, and the court's refusal to allow petitioners any opportunity to object to the fees of the special master. The only portion of the injunction vacated by the Ninth Circuit was the ordered purchase of electric typewriters, which respondents conceded on appeal were not constitutionally required.

- Purchase a complete up-to-date set of Pacific Reporters and Digests for each law library;
- Allow inmates to regulate the time, place and manner in which they gain access to and utilize the law library and legal assistants; and
- Allow inmates direct access to the library stacks, unless petitioners can first document an actual security risk.

Although the plaintiff class in this case is not limited to illiterate or non-English speaking inmates, the Ninth Circuit nevertheless held that ADOC's failure to staff its libraries with trained bilingual legal assistants, *in addition to* furnishing law libraries, across the entire state, violated the right to access. App. A at 8a; 43 F.3d at 1267. The court acknowledged that this aspect of its holding conflicts with the holdings of other courts of appeals. App. A at 14a; 43 F.3d at 1270.

The court also held that "unless ADOC can demonstrate actual security risks, an inmate should be allowed access to the law library," even if that inmate is in "lockdown" because of previous disciplinary or security problems. App. A at 6a; 43 F.3d at 1267. The court, however, did not even address the constitutional adequacy of ADOC's "paging" system for these high-risk inmates, whereby materials are sent to the prisoner's cell, upon request, generally within 24 hours, or the inmate receives help from a designated inmate legal assistant.

In response to ADOC's argument that the scope of the injunction far exceeded the requirements of *Bounds*, the Ninth Circuit stated that the district court indeed had "broad" powers to do so, which were inherent in the court's power to fashion equitable remedies. App. A at 13a; 43 F.3d at 1270.

REASONS FOR GRANTING THE PETITION

The lower courts have ~~considered~~ what is "reasonable" with what is constitutionally required. This Court's decision in *Bounds* was the culmination of a series of opinions concerning the ability of prisoners to petition the courts. See generally *Johnson v. Avery*, 393 U.S. 483 (1969); *Younger v. Gilmore*, 404 U.S. 15 (1971); *Wolff v. McDonnell*, 418 U.S. 539 (1974). Both *Johnson* and *Wolff* invalidated prison regulations that had *barred* prisoners from assisting each other. Nothing in these opinions, however, suggests that states are constitutionally *required to furnish* the sweeping legal assistance ordered by the lower courts here. The Ninth Circuit failed to recognize that distinction between what a state must *allow* to occur and what a state is constitutionally *required to furnish* in terms of inmate legal assistance.

The district court's order has crossed the line between constitutional interpretation and micro-management of a state's penal system. Two aspects of the Ninth Circuit's decision directly conflict with other courts of appeals. While the Ninth Circuit has acknowledged only one of these, both are clear conflicts.

Review by this Court is necessary to resolve the conflicts and restore the constitutionally prescribed lines that mark the boundaries between the authority of federal judges and that of elected state officials.

1. To the extent this case involves class members who are illiterate or non-English speaking, petitioners, and states in general, need to know whether *Bounds* requires them to furnish trained bilingual legal assistants in addition to constitutionally adequate law libraries. The courts of appeals are split on this issue. Some courts have held that law library access for these prisoners is constitutionally adequate, because this places them in the same

position as their civilian counterparts. These courts reason that prisoners should enjoy no greater advantage in this respect solely because they are convicted criminals. *Hooks v. Wainwright*, 775 F.2d 1433, 1436-37 (11th Cir. 1985), *cert. denied*, 479 U.S. 913 (1986); *Bee v. Utah State Prison*, 823 F.2d 397, 398 (10th Cir. 1987). See also *Williams v. Leeke*, 584 F.2d 1336, 1341 (4th Cir. 1978) (Hall, J., concurring in part and dissenting in part), *cert. denied*, 442 U.S. 911 (1978).

Other circuits have said *Bounds* requires states to furnish functionally illiterate prisoners with special legal assistance. These courts reason that without legal assistance from persons trained in the law, illiterate prisoners are denied "meaningful" access because the libraries are of no use to them. See generally *Knop v. Johnson*, 977 F.2d 996, 1006 (6th Cir. 1992), *cert. denied*, *Knop v. McGinnis*, 113 S.Ct. 1415 (1993); *Cruz v. Hauck*, 627 F.2d 710, 721 (5th Cir. 1980); *Valentine v. Beyer*, 850 F.2d 951, 956-57 (3d Cir. 1988).⁴

This division among the circuits is particularly troublesome for border states like Arizona, which are experiencing an ever-increasing influx of non-English speaking illegal immigrants. It is unacceptable that two neighboring border states, Arizona and New Mexico, should be subject to different constitutional requirements solely because they happen to be located in different circuits, both of which have addressed this question and reached opposite results. Granting this petition for writ of certiorari is necessary to settle the issue and resolve the conflict.

⁴ Prior to the decision in the present case, the Ninth Circuit had assumed, but had not decided, that the Constitution required additional assistance to uneducated, illiterate, or non-English speaking inmates. *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 856 (9th Cir. 1985).

2. This case squarely presents another issue on which the courts of appeals are in conflict. The issue is whether *Bounds* requires either law libraries or legal assistance from persons trained in the law, or whether *Bounds* requires both for a class of prisoners that is not limited to illiterate or non-English speaking inmates. In this case, the lower courts have required ADOC to supply both under some general concept of "meaningful" access, which petitioners maintain contravenes the specific holding of *Bounds*.

Most circuits have interpreted *Bounds* to require only "adequate law libraries or adequate assistance from persons trained in the law," but not both. See *Cepulonis v. Fair*, 732 F.2d 1, 6 (1st Cir. 1984); *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 855 (9th Cir. 1985); *Campbell v. Miller*, 787 F.2d 217, 229-30 (7th Cir. 1986), *cert. denied*, 479 U.S. 1019 (1986); and *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985). Prior to this case, the Ninth Circuit was among the courts of appeals adhering to this majority rule. *Lindquist*, 776 F.2d at 855.

Other federal courts, relying upon one sentence from *Bounds*, 430 U.S. at 832, evaluate the circumstances "as a whole," and conclude that law books plus access to legal assistance from individuals trained in the law are required. See *Battle v. Anderson*, 614 F.2d 251, 255-56 (10th Cir. 1980); *Kendrick v. Bland*, 586 F. Supp. 1536, 1549 (W.D.Ky. 1984); and *Glover v. Johnson*, 478 F. Supp. 1075, 1096 (E.D.Mich. 1979). The Ninth Circuit in this case recognized the conflict. App. A at 14a; 43 F.3d at 1270.

3. Mindful that "prison administrators . . . , and not the courts, are to make the difficult judgments concerning institutional operations," *Turner v. Safley*, 482 U.S. 78, 89 (1987), this Court has allowed infringements

on prisoners' constitutional interests that are reasonably related to legitimate penological interests. *Id.*⁵

In this case, the Ninth Circuit ignored the legitimate penological interests of Arizona's prison administrators. By forcing ADOC to allow *all* inmates access to the law libraries, including those in high-security lockdown units, the Ninth Circuit erroneously disregarded the "reasonable relation" standard. It failed even to consider whether the "paging" system, in combination with help from designated inmate legal assistants for these high-security inmates, is a constitutionally adequate method of access that is reasonably related to a legitimate penological interest. The error threatens ADOC's ability to maintain adequate security at its prisons.

4. During trial, respondents presented no evidence whatsoever that illiterate or non-English speaking inmates were actually denied access to the courts or that ADOC's efforts to assist them were insufficient. For this reason, respondents' claims should have been denied summarily. See *Shango v. Jurich*, 965 F.2d 289, 292-93 (7th Cir. 1992); *Vandelft v. Moses*, 31 F.3d 794, 796 (9th Cir. 1994) (prisoner who contends that inadequate law library violates his right of access to the courts must show that the inadequate access caused him actual injury). The Ninth Circuit thus erred in placing the burden upon ADOC to demonstrate that its chosen methods of access were adequate. App. A at 5a; 43 F.3d at 1266.⁶

⁵ The *Turner* standard applies to all prison regulations that impinge on an inmate's constitutional rights. See *Washington v. Harper*, 494 U.S. 210, 223 (1990); *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987).

⁶ The Ninth Circuit also erred when it refused to consider the actual injury issue (App. A at 6a, n.3; 43 F.3d at 1267, n.3). Petitioners had argued in their Ninth Circuit opening brief that respondents had not presented evidence of actual injury. See e.g., opening brief at 10 ("there existed no evidence that inmates who were slow readers have had their cases dismissed with prejudice as

5. This Court in *Bounds* emphasized that prison administrators must have wide discretion in the management of their prisons. 430 U.S. at 832-33.⁷ This Court has repeatedly emphasized the need for judicial restraint in the area of prison administration. See *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989) (courts should defer to prison administrators in resolving the day-to-day problems in managing a prison, which lie within the expertise of prison officials); *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748, 764 (1992) ("district court [must] defer to local government administrators, who have the 'primary responsibility for elucidating, assessing, and solving' the problems of institutional reform . . ."). Justice O'Connor, in a concurring opinion, recently affirmed that "[b]eyond the requirements of *Bounds*, the matter is one of legislative choice based on difficult policy considerations and the allocation of scarce legal resources." *Murray v. Giarratano*, 492 U.S. 1, 13 (1989).

While paying lip service to the proposition that the "remedy may not overly intrude into the administration of the prison system," App. A at 14a; 43 F.3d at 1270, the Ninth Circuit violated the principle and upheld virtually every minute, intrusive remedial measure the district judge ordered. Taken together, these mandates constitute precisely the type of micro-management of state prisons repeatedly criticized by this Court. Calling the injunction necessary for "effective" relief does not bring this micro-

a result of their inability to receive adequate legal assistance"); at 24 ("Significantly, Plaintiffs failed to offer any evidence that any inmate denied physical access to the library was prevented from exercising his right of access to the courts by virtue of insufficiently trained legal assistants"); and at 26 ("No such evidence exists [that the 261 inmates denied access to the law library were in need of, but did not receive, help with their legal work caused by a shortage of legal assistants]").

⁷ At the conclusion of *Bounds*, this Court praised the district court for not "thrust[ing] itself into prison administration." 430 U.S. at 832-33.

management within the scope of what the Constitution requires.

Among other things, the Ninth Circuit allowed Judge Muecke to: (1) set, within limits, the actual operating hours and days for the law libraries, without regard to actual use; (2) dictate where the prisoners may sit; (3) analyze the prisons' schedules of activities and events, the names of all library employees, and their specific work schedules; (4) set the precise procedure for ADOC's response to library and legal assistance requests; (5) impose conditions for removing prisoners from the libraries; (6) dictate the contents of a research course videotape and live presentation that ADOC must provide, and when it may be viewed; (7) impose detailed operating procedures for legal assistants; (8) set the qualifications for librarians hired; (9) specify the minimum number and length of attorney telephone calls which must be allowed; and (10) regulate the time, place and manner in which inmates gain access to and use the law library and legal assistants. Not only does this greatly exceed *Bounds*, but it is difficult to imagine a more intrusive and egregious example of federal court micro-management of a prison system.⁸

⁸ The pervasiveness of the court's micro-management is perhaps best demonstrated by the extent and specificity of the library collection the lower courts said was constitutionally mandated in this case. As a result of an earlier order by the same district judge, all 33 prison law libraries in the State of Arizona are already equipped with what the district court characterized as the "Muecke list". *Wilkinson v. McDougal*, CIV 81-1397. The Muecke list consists of the United States Code Annotated; Supreme Court Reporter; Federal Reporter Second; Federal Supplements; Shepards U.S. Citations; Shepards Federal Citations; Local Rules for the Federal District Court; Modern Federal Practice Digests; Federal Practice Digest (Second); Arizona Code Annotated; Arizona Reports; Shepards Arizona Citations; Arizona Appeals Reports; Arizona Law-of-Evidence (Udall); ADC Policy Manual; 108 Institutional Management Procedures; Federal Practice and Procedures (Wright); Corpus Juris Secundum and Arizona Digest. The lower courts in this case have now held that in addition to

The Ninth Circuit implicitly agreed that the district court's injunction orders "relief that the Constitution would not of its own force initially require" (App. A at 13a; 43 F.3d at 1270). Nonetheless, and despite this Court's repeated admonition that the remedy must do no more than correct the specific violation,⁹ the Ninth Circuit purported to uphold the district court's injunction, which reads like a statute or regulation, under the guise of the district court's "broad equitable powers" to remedy past wrongs. App. A at 13a; 43 F.3d at 1270.

Bounds established that the Fourteenth Amendment sets minimum standards for prisoner access to the courts. There is a point at which federal judges, in attempting to vindicate that right, exceed their proper Article III authority to decide cases or controversies and in effect become not only surrogate prison wardens but also surrogate legislators, with unlimited power to tax and spend. In this case the lower courts have crossed that line, in conflict with the decisions of other courts of appeals. Having stayed the district court's injunction pending the filing of this petition for writ of certiorari, the Court should

this "Muecke list," the Fourteenth Amendment requires complete sets of Pacific Reporters, Digests, and self-help manuals. This is directly contrary to case law from both this Court and another panel of the Ninth Circuit, holding that *Bounds* does not require states to purchase regional reporters. *Bounds*, 430 U.S. at 819; *Lindquist*, 776 F.2d at 856.

⁹ See generally *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class"); *Dayton Bd. of Education v. Brinkman*, 433 U.S. 406, 417 (1977) (instead of tailoring injunctive remedy commensurate with specific constitutional violations, court improperly imposed system-wide remedy); *Milliken v. Bradley*, 418 U.S. 717, 738 (1971) ("once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation'"); and *Keyes v. School Dist. No. 1, Denver, Colorado*, 418 U.S. 189, 213 (1973) (only if there has been a system-wide impact may there be a system-wide remedy).

grant the petition to remedy the conflicts and restore the separation of powers lines of demarcation to their proper bounds.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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March 14, 1995

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APPENDIX A

[Filed Dec. 27, 1994]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-17169

D.C. No. CV 90-0054 CAM

FLETCHER CASEY, JR., *et al.*, on behalf of themselves
and all others similarly situated,
Plaintiffs-Appellees,

vs.

SAMUEL A. LEWIS, Director,
Arizona Department of Corrections, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the District of Arizona
C. A. Muecke, District Judge Presiding

Argued and Submitted: November 16, 1994
Berkeley, California
Submission Deferred: November 17, 1994
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Opinion by Judge Harry Pregerson

OPINION

Before: LAY,* PREGERSON, and O'SCANNLAIN,
Circuit Judges

PREGERSON, Circuit Judge:

Defendants-Appellants Samuel A. Lewis, Director of the Arizona Department of Corrections, et al., appeal the district court's order finding that Plaintiffs-Appellees Fletcher Casey Jr., et al., prisoners incarcerated in facilities of the Arizona Department of Corrections, were unconstitutionally denied meaningful access to the courts. Defendants also appeal the district court's issuance of a permanent injunction requiring the Arizona Department of Corrections to implement a plan to ensure prisoners meaningful access to the courts. We have jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1). We AFFIRM in part, and VACATE and REMAND in part.¹

BACKGROUND

The Arizona Department of Corrections ("ADOC") operates nine prison facilities located within the State of Arizona. The total male inmate population as of January 22, 1992 was 14,424 and the total female inmate population was 922. On January 12, 1990, pursuant to 42 U.S.C. § 1983, twenty-two prisoners filed this class ac-

* The Honorable Donald P. Lay, Senior Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

¹ At oral argument, attorneys for both Plaintiffs and Defendants expressed a willingness to use the services of this Court's settlement program. This settlement program provides an opportunity for litigants to resolve their dispute in a non-adversarial setting. Ninth Circuit Rule 33-1. Accordingly, we deferred submission of this case for thirty days to enable the parties to reach a settlement. However, before the settlement process had even begun, Defendants declined to mediate. Accordingly, we took this case out of deferred submission into active status.

tion in the United States District Court for the District of Arizona, claiming, *inter alia*,² that prison officials unconstitutionally denied them meaningful access to the courts. The certified class consists of all adult persons who are now, or who will be, in the custody of the Arizona Department of Corrections. Defendants are agents, officials, or employees of ADOC.

On November 16, 1992, following a three-month bench trial, U.S. District Judge C.A. Muecke ruled that ADOC's law libraries and legal assistance programs were inadequate, unconstitutionally denying prisoners meaningful access to the courts. *Casey v. Lewis*, 834 F. Supp. 1553 (D. Ariz. 1992). Specifically, Judge Muecke found the following constitutionally deficient: the contents of the

² The complaint also alleged that prison officials unconstitutionally denied plaintiffs attorney-client contact visitation at high-risk prison facilities, prevented HIV-positive inmates from applying for food-service positions in prison cafeterias, and transferred inmates from prison sites within the State without procedural due process. The district court granted summary judgment in favor of the plaintiff class, and entered an order enjoining ADOC from prohibiting contact visits between inmates and their attorneys except for good cause, and enjoining ADOC from denying food-service employment to HIV-positive inmates absent certain justifications. *Casey v. Lewis*, 773 F. Supp. 1365 (D. Ariz. 1991). A divided panel of this Circuit reversed the district court's grant of summary judgment and vacated the injunction. *Casey v. Lewis*, 4 F.3d 1516 (9th Cir. 1993).

On the remaining allegations, which are not the subject of this appeal, the district court ruled that the treatment available to seriously mentally ill inmates violated the Eighth Amendment, the unequal treatment of male and female inmates violated the female inmates' equal protection rights and Eighth Amendment rights, instances in which ADOC failed to provide disabled inmates accessible bathrooms, showers, and cells did not rise to the level of constitutional violations, delays in providing hearing aids violated the Eighth Amendment, and the provision of legal assistance instead of braille legal books did not violate blind inmates' rights. *Casey v. Lewis*, 834 F. Supp. 1477 (D. Ariz. 1993); *Casey v. Lewis*, 834 F. Supp. 1569 (D. Ariz. 1993).

library; the access to the libraries; the legal assistance for prisoners who are illiterate or who do not speak English; library staffing; the indigency standard for receiving legal supplies; the photocopying policy that allowed the confidentiality of legal documents to be breached; and the restrictions on inmates' telephone calls to their attorneys. *Id.*

The district court appointed Dan Pachoda as Special Master and Expert, and Janet Bliss as Assistant Special Master to work with the parties to develop the proper injunctive relief. On October 13, 1993, the district court issued a permanent injunction, requiring ADOC to implement the legal access plan devised by Pachoda. ADOC now appeals, challenging the district court's findings of fact and conclusions of law, the scope of injunctive relief ordered, and the requirement that ADOC pay the fees of the Special Master without having been given an opportunity to object.

ANALYSIS

A. Standard of Review

We review the district court's legal conclusions de novo. *U.S. v. Yacoubian*, 24 F.3d 1, 3 (9th Cir. 1994). We defer to the district court's findings of fact unless they are clearly erroneous. *Anderson v. City of Bessemer*, 470 U.S. 564, 571-73 (1985); Fed. R. Civ. P. 52(a). We review the scope of injunctive relief for an abuse of discretion or application of erroneous legal principles. *Dexter v. Kirschner*, 984 F.2d 979, 982 (9th Cir. 1992).

B. District Court's Findings of Fact and Conclusions of Law

In *Bounds v. Smith*, 430 U.S. 817, 823 (1977), the Supreme Court firmly established that prisoners have a fundamental right of meaningful access to the courts. The importance of this right cannot be overstated. It is the right upon which all other rights depend. In *Wolff v.*

McDonnell, 418 U.S. 539, 579 (1974), the Court explained that this right "is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." See also *Gilmore v. Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970) ("'Access to the courts' . . . encompasses all the means a defendant . . . might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him."), *aff'd sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971) (per curiam).

To discharge the duty of assuring prisoners meaningful access to the courts, the Court held that States "must assist inmates in the preparation and filing of meaningful papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds*, 430 U.S. at 828. In determining the constitutional adequacy of a legal access program, the Court directed district courts to evaluate the program "as a whole," emphasizing that "meaningful access to the courts is the touchstone." *Id.* at 832, 823.

We hold that the district court correctly applied case law in concluding that ADOC's legal access program unconstitutionally denied inmates meaningful access to the courts. In *Storseth v. Spellman*, 654 F.2d 1349, 1352 (9th Cir. 1981), we held that it is the State's burden to provide meaningful access and to demonstrate that its chosen method is inadequate. ADOC has not met this burden.

1. Contents of the Law Libraries

Undisputed facts support the district court's finding that the contents of ADOC's law libraries are inadequate. In several libraries, volumes of various reporters, as well as the pocket parts to various secondary sources are missing. Updated inventories are unquestionably an essential element of an adequate library system. See *Lindquist v.*

Idaho State Board of Corrections, 776 F.2d 851 (9th Cir. 1985) (affirming district court's order that state must furnish essential and up-to-date law books).

Several libraries also do not contain self-help manuals to instruct inmates on how to use the law books. The complexities of legal research at the very least require these aids to enable inmates to use the books effectively. As the Court in *Bounds* mandated, access must be "adequate, effective, and meaningful." 430 U.S. at 822 (emphasis added).

2. Physical Access

We recognized in *Lindquist* that the Constitution does not guarantee a prisoner unlimited access to a law library, and that "[p]rison officials of necessity must regulate the time, manner, and place in which library facilities are used." 776 F.2d at 858. Accordingly, in *Touissaint v. McCarthy*, 801 F.1d 1080, 1109 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987), we held that prisons may deny inmates physical access to the law library if such access would threaten institutional security. We affirmed the district court's order that required prison officials to allow segregated prisoners access to a law library "as reasonably necessary, absent documented security reasons." *Id.* at 1108-09.

Following the rule established in *Touissaint*, we hold that unless ADOC can demonstrate actual security risks, an inmate should be allowed access to the law library. The district court correctly concluded that ADOC may not routinely prohibit lockdown inmates from physically using the law library.³ Access to the law library's books is crucial because as we explained in *Touissaint*,

³ We acknowledge that in *Vandelft v. Moses*, No. 92-36566, slip op. at 8359 (9th Cir. July 26, 1994), a divided panel of our Court held that a prisoner who contends that his right of access to the courts was violated because of inadequate access to a law library

legal research often requires browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the face of unfamiliar adverse precedent. New theories may occur as a result of a chance discovery of an obscure or forgotten case.

801 F.2d at 1110 (quoting *Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978), *cert. denied*, 441 U.S. 911 (1979)).

3. Legal Assistance

For those inmates deemed security risks and denied access to the library, *Bounds* requires the State to provide legal assistance. 430 U.S. at 828. The district court did not err in concluding that the legal assistance provided by ADOC was constitutionally deficient. In some facilities, officials do not require inmate applicants to possess any qualifications aside from a literacy in English. In others, the tests developed to assess the applicants' qualifications do not test for skills in legal research and writing, nor do the officials administer the tests to all of the applicants. Furthermore, in most facilities, the officials do not provide any type of training for the legal assistants. This deficiency directly contravenes the rule set forth in *Bounds* that legal assistance must be provided by persons "trained in the law." *Id.* See also *Gluth v. Kangas*, 951 F.2d 1504, 1508 (9th Cir. 1991) ("the appearance of minimal capacity to assist other inmates alone plainly does not suffice").

Sufficient numbers of trained legal assistants also must be provided to prisoners who are functionally illiterate or whose primary language is not English. It goes without saying that "a book and a library are of no use, in and of themselves, to a prisoner who cannot read." *Lindquist*,

"must show that the inadequate access caused him actual injury." However, because this issue is not now before us, we need not consider *Vandelft*.

776 F.2d at 855-56. ADOC's failure to provide bilingual legal assistants or law clerks in many of the facilities denies non-English-speaking inmates meaningful access. The reliance upon fellow prisoners who are not trained in the law simply does not suffice as an adequate substitute. As the district court found, these fellow prisoners frequently cannot comprehend nor translate legal terminology. Consequently, illiterate and non-English-speaking inmates have been unable to file legal actions or have had their cases dismissed with prejudice.

To be sure, we have held that "the Constitution does not require the elimination of all economic, intellectual, and technological barriers to litigation." *Sand v. Lewis*, 886 F.2d 1166, 1169 (9th Cir. 1989). However, in invalidating regulations that barred prisoners from assisting each other, the Supreme Court recognized that for illiterate inmates, an adequate library alone was plainly insufficient. *Johnson v. Avery*, 393 U.S. 483, 489 (1969); *Wolff v. McDonnell*, 418 U.S. at 577-80.⁴ The duty of States to furnish legal assistance to illiterate inmates and non-English-speaking inmates is implicit in the holding of *Bounds*, which imposed on States "affirmative obligations to assure *all* prisoners meaningful access to the courts." 430 U.S. at 824 (emphasis added). Without such assistance, illiterate and non-English-speaking inmates undoubtedly would be unable to draft any legal papers, much less meaningful ones.⁵ As the Sixth Circuit observed, "there can be no meaningful access to the judicial system unless some literate person is available to reduce . . . [the] stories [of illiterate inmates] to intelli-

⁴ Indeed, as the *Bounds* Court pointed out, the Court in *McDonnell* decided that inmates should be allowed to assist each other despite the fact that the State already furnished an adequate law library. 430 U.S. at 824.

⁵ This holding is in harmony with the requirement under *Bounds* that indigent inmates must be provided legal supplies necessary to file their claims. 430 U.S. at 824.

gible written pleadings." *Knop v. Johnson*, 977 F.2d 996, 1006 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1415 (1993). Importantly, the *Bounds* Court noted the advantages of providing legal assistance over libraries alone: more efficient and skillful handling of prisoner cases, the avoidance of disciplinary problems associated with writ writers, and the mediation of many prisoner complaints that would otherwise burden the courts.⁶ 430 U.S. at 831-32.

ADOC argues that it does not need to provide legal assistance to illiterate and non-English-speaking prisoners because through the provision of a law library, it has removed "the barriers to court access erected by imprisonment." Appellants' Brief at 23. This argument is without merit because ADOC overlooks the fact that the restrictions on a prisoner's liberty attendant to imprisonment prevents the prisoner from enlisting the assistance of his family, friends, and a myriad of social services and legal aid organizations that would otherwise be available.

4. Library Staff

In *Lindquist*, 776 F.2d at 855, we noted that to furnish an adequate law library, "some library personnel might be required to keep the books in order." In some facilities, ADOC staffs the library only with security officers who are not trained in maintaining a law library. We affirm the district court's conclusion that this is inadequate. Library staff should at least have some basic knowledge of legal research.

⁶ In the Ninth Circuit alone, fourteen staff attorneys in San Francisco divide their time exclusively between direct criminal appeals and habeas corpus petitions. Thirteen attorneys work on civil appeals, at least 50 percent of which are prisoner § 1983 actions. There are twenty *pro se* law clerks and nine law clerks who focus exclusively on death penalty appeals.

5. Indigency Standard

Bounds affirmed the principle that “indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them.” 430 U.S. at 824-25. ADOC’s indigency policy allows a prisoner to obtain free legal supplies only if his account balance does not exceed \$22 per month. The prisoner’s account is then debited the cost of the supplies, and the debit is held against the account until funds become available.

Defendants argue that the prisoners here have failed to allege an actual injury in a non-core *Bounds* issue, as required under *Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989). In *Sands*, we held that if the claimant does not allege inadequate law libraries or inadequate legal assistance, a court must consider whether the allegation consists of a “specific instance in which an inmate was actually denied access to the courts.” *Id.*

Although Plaintiff’s Complaint did not allege that ADOC’s indigency standard denied inmates meaningful access to the courts, Plaintiffs did introduce, without any objection from Defendants, evidence to show that the indigency standard was inadequate. *See* Transcript at 136 (McFadden—Direct) (testimony that the cost of basic supplies alone can amount to \$20); Transcript at 154 (Bishop—Direct) (testimony that prisoners were unable to purchase needed legal supplies under the \$22 standard). In addition, the adequacy of the indigency standard was addressed in Defendants’ pre-trial memorandum. *See* Defendants’ Amended Pre-Trial Statement at 15.

Under Fed. R. Civ. P. 15(b), “when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” Express consent may be found in a stipulation or pre-trial order, and implied consent may be found where evidence is introduced

without objection. *See Dunn v. Trans World Airlines, Inc.*, 589 F.2d 408, 413 (9th Cir. 1978) (Rule 15(b) amendment proper since opposing party referred to unpleaded matter in its trial memorandum); *Slavitt v. Kauhi*, 384 F.2d 530, 534 (9th Cir. 1967) (district court should grant leave to amend because issue was introduced into evidence without objection from defendant); 3 *Moore’s Federal Practice* ¶ 15.11 (1994).

Instead of permitting Plaintiffs to amend their pleadings to include an allegation that ADOC’s indigency standard deprived indigent inmates meaningful access to the courts, we will treat the pleadings as having been so amended because under Rule 15(b), “the failure to . . . amend does not affect the result of the trial.” *See also Dunn*, 589 F.2d at 413 (“If an amendment to the pleadings to conform to the proof should have been made, the Courts of Appeals will presume that it is so made to support the judgment.”) (citations omitted).

A study of the actual cost of basic supplies and legal supplies at the Florence unit determined that \$46 is the more realistic amount. *Gluth*, 951 F.2d at 1508. However, because the district court did not make a specific finding that ADOC’s indigency standard was inadequate for the plaintiff class, we remand this issue for a proper finding.

6. Photocopying Policy

We reject Defendants’ erroneous assertion that Plaintiffs have not alleged an “actual injury” as defined by *Sands, supra*, to state a claim that the photocopying policy breaches the confidentiality of inmates’ legal documents. Plaintiffs’ Complaint specifically alleges that their confidential legal memos from legal assistants are routinely read by ADOC staff and that because they must give their materials to the staff to be photocopied, the confidentiality of those materials is compromised. Complaint

at 14. Read liberally, as required by our decisions, these allegations suffice to state a claim for the denial of meaningful access to the courts. See *King v. Atiyeh*, 814 F.2d 565, 568 (9th Cir. 1987) (plaintiffs successfully alleged that the provision of only three stamps per week denied them meaningful access to the courts even though complaint only stated that it was often necessary to communicate with the courts more than three times per week).

The district court found that inmates' legal documents have been read by staff members who photocopy them. In *Wolff v. McDonnell*, 418 U.S. 575-77, the Court upheld a prison regulation that allowed staff to inspect, but not to read, inmates' legal mail. Lower courts have held that legal mail may not be read nor copied without the permission of the inmate. *Jensen v. Klecker*, 648 F.2d 1179, 1182 (8th Cir. 1981); *Ramos v. Lamm*, 639 F.2d 559, 582 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Guajardo v. Estelle*, 580 F.2d 748, 758-59 (5th Cir. 1978). Thus, the district court did not err in concluding that ADOC's photocopying policy, which allows the confidentiality of inmates' legal documents to be breached, denies inmates meaningful access to the courts.

7. Telephone Calls to Attorneys

In *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990), we held that "policies will not be upheld if they unnecessarily abridge the defendant's meaningful access to his attorney and the courts," and that "the opportunity to communicate privately with an attorney is an important part of that meaningful access." See also *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) ("Regulations and practices that unjustifiably obstruct the availability of professional representation . . . are invalid."). Because an inmate's access to his attorney is inextricably tied to his

meaningful access to the courts,⁷ we reject Defendant's argument that to state a claim, Plaintiffs need to allege an actual instance in which their access to the courts has been impeded.

The district court correctly concluded that the restrictions on attorney telephone calls interfere with inmates' meaningful access to the courts. ADOC has not advanced any legitimate justification for its restrictions, such as the limitation of calls to issues related to a prisoner's sentence, the granting of calls according to institutional risk score as opposed to need, and the requirement that a prisoner divulge the nature of a call before it is granted.

C. Scope of Injunctive Relief

Defendants challenge the breadth of the district court's permanent injunction,⁸ arguing that it extends beyond the scope authorized by *Bounds*. It is well established that "once a right and a violation have been shown, the scope of the district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Hutto v. Finney*, 437 U.S. 677, 688 n.9 (1979) (citations omitted). While the remedy must do no more and no less than correct a particular constitutional violation, *Hoptowit v. Ray* 682 F.2d 1237, 1246-47 (9th Cir. 1982), "a federal court may order relief that the Constitution would not of its own force initially require if such relief is necessary to remedy . . . [that] violation." *Toussaint*, 801 F.2d at 1087. See also *Milliken v. Bradley*, 433 U.S. 267 (Milliken II) (1977) (upholding remedial educational programs to cure effects of

⁷ When an attorney is involved, the likelihood of a prisoner obtaining discovery, a hearing, and ultimate relief increases significantly. See Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 624-25 (1979).

⁸ The permanent injunction is attached as Appendix A to this opinion.

de jure segregation even though such programs are not required under the Constitution).

We conclude that the district court did not abuse its discretion in ordering the relief set forth in its permanent injunction. At the outset, we must address what can only be characterized as the tension between the twin holdings of *Bounds*. See Michael B. Mushlin, 2 *Rights of Prisoners* 35-41 (2d ed. 1993). On the one hand, the mandate to States is to assure "meaningful access." 430 U.S. at 823. But to discharge this duty, the Court prescribed "adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828. Some circuits, including our own, have interpreted *Bounds* only to require *either* adequate law libraries or adequate legal assistance. See *Lindquist*, 776 F.2d at 885. Practically, though, because the great mass of prisoners are not sufficiently educated, such a legal access plan would still keep out of their reach meaningful access to the courts. Accordingly, in *Lindquist*, we went on to say that even though states may choose which of the two components to provide, "this is not to say that a court may never order a mixture of [the two]." *Id.* (quoting *Cepulonis v. Fair*, 732 F.2d 1, 6 (1st Cir. 1984)).

Defendants appropriately remind us that a remedy may not overly intrude into the administration of the prison system. *Touissaint*, 801 F.2d at 1087. Yet, the remedy ultimately must be "effective." *Id.* at 1086. Given that 35 percent of ADOC's inmate population cannot read English above the seventh grade level, and 14.5 percent cannot speak English, it is unrealistic to expect that meaningful access to the courts can be achieved by providing law libraries alone. The adequacy of any remedial program must turn on its effectiveness in satisfying the State's obligation to ensure meaningful access to the courts. In fashioning an effective remedy, it is within the discretion of the district court to order a combination of remedial programs.

1. Contents of Libraries

The order requiring the purchase of the Pacific Reporters and Digests is reasonable. As the district court noted, because some prisoners detained in ADOC facilities are serving time for crimes committed in a neighboring state, they will need the case law of that state, which is contained in the Pacific Reporters but not in the Arizona Reporters. In addition, in shepardizing Arizona cases, the researcher is often referred to other cases decided in the western region of the United States, warranting the inclusion of the Pacific Reporters in the libraries' inventory.

2. Physical Access

The injunction orders ADOC to allow all inmates access to the law libraries absent a showing that the inmate is a security risk. Defendants argue that under this order, an inmate must first cause harm before being denied access, thus precluding officials from taking preventive measures to maintain security. We disagree. The order seeks to prevent the arbitrary denial of access to the library, thus prison officials would be in compliance with the order if they can rationally justify a particular denial.

The order requiring the law libraries to remain open for at least fifty hours each week is reasonable. Although ADOC subsequently expanded the hours of operation, the district court found that at the time this action was filed, prisoners had insufficient time to use the libraries. See *Lindquist*, 776 F.2d at 858 ("the existence of an adequate law library does not provide for meaningful access to the courts if the inmates are not allowed a reasonable amount of time to use the library"). Given the finding of the district court, and that there is no "reasonable expectation" that the violations will not recur, see *Gluth*, 951 F.2d at 1507, the district court did not abuse its discretion in ordering expanded hours to prevent Defendants from reverting to their prior practice. Fifty hours per week does not constitute "unlimited access." See *Lindquist*, 776 F.2d

at 858. Indeed, this relief, which amounts to approximately seven hours per day, is less than the eleven hours per day ordered in *Lindquist*. *Id.*

3. Legal Assistance

Defendants erroneously assert that the injunction mandates legal assistance for all prisoners. Consistent with *Bounds*, the injunction explicitly states that legal assistance should be provided to prisoners who "because of language factors or lack of access to the law library, or for other reasons, are unable to perform adequate legal research and writing." Permanent Injunction at 11.

The training videotape for all the prisoners, to which Defendants object, does not constitute "legal assistance." Rather, it is a form of self-help that the district court, in its discretion, concluded would make the law library accessible to the prisoners. Defendants also have not shown any hardship that would result from making the videotape available to all the prisoners. ADOC has already ordered the tape to train the law clerks and legal assistants.

4. Library Staff

Contrary to Defendants' assertion, the injunction does not require each librarian to possess a law degree or paralegal degree. Rather, the injunction requires "professionally trained" librarians who must possess either a library science degree, law degree, or paralegal degree. Permanent Injunction at 7-8. While we express no opinion on whether the librarian should be trained in the law, at the very least, it is not unreasonable to ensure that the librarian is in fact trained for the demands of his or her job through the requirement of a library science degree and a basic knowledge of legal research.

5. Indigency Standard

The district court ordered ADOC to set the indigency standard at \$46. However, as discussed above, because

the district court did not make a specific finding as to the inadequacy of ADOC's current standard, we vacate this provision of the injunction and remand for a proper finding.

Because Plaintiffs do not challenge Defendants' objection to the order requiring ADOC to provide typewriters, we vacate that provision of the injunction (Section III.C.).

6. Photocopy Policy

Similarly, because Plaintiffs do not object to an increase of photocopying costs from five cents per page to eight cents per page, we remand this issue to the district court to determine whether the increase is justified.

We affirm the requirement that ADOC post a sign by the photocopy machine directing staff not to read inmates' legal materials. Not only does this relief fall entirely within the discretion of the district court, but Defendants also concede that it is "innocuous." Appellants' Reply Brief at 15.

7. Attorney Telephone Calls

We affirm the requirement that prisoners be allowed at least three twenty-minute phone calls per week to their attorneys. The order certainly does not ignore, as Defendants contend, ADOC's preference that such communications occur through written correspondence or in-person interviews. It is undisputed that ADOC can implement this provision at little cost since the prisoner either calls collect or pays for the calls. Furthermore, this provision can potentially save staff time because it would no longer be necessary for the staff to determine which phone calls qualify as an emergency.

D. Defendants' Failure to Preserve their Objections

Plaintiffs contend that with respect to the functions of the legal assistants, ADOC never contested the relevant

provision in the proposed order, thereby waiving its right to object after the final order was entered. However, Plaintiffs' citation of *Gluth* is inapposite because we held there that the defendants should have raised an argument on an issue when the district court entered its partial final judgment, which effectively closed that issue. 951 F.2d at 1511. Because the proposed order here does not constitute a final judgment, we reject Plaintiffs' argument that Defendants failed to preserve their objections. Moreover, in *Gluth*, despite the defendants' failure, we saw no reason to bar them from raising the issue on appeal. *Id.*

E. *Payment of the Special Master's Fees*

Defendants request that it be given an opportunity to object to the *fees*, as well as the costs and expenses of the Special Master. Plaintiffs do not oppose this request. In any event, it would be unfair to order Defendants to pay the fees without an opportunity to object. Accordingly, we remand the order of reference to the district court to incorporate Defendants' request for an opportunity to object to the fees of the Special Master.

CONCLUSION

For the foregoing reasons, we AFFIRM in part, and VACATE and REMAND in part.

APPENDIX B

[Filed Nov. 16, 1992]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CIV 90-0054 PHX CAM.
No. CIV 91-1808 PHX CAM
(consolidated)

FLETCHER CASEY, *et al.*,
Plaintiffs,

vs.

SAMUEL A. LEWIS, *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ACCESS TO THE COURTS

Having considered the evidence presented by the parties in this matter regarding the access to the courts issues, the Court concludes as follows:

FINDINGS OF FACT

I. Access to the Courts

A. Physical Access without access to legal materials

In a number of facilities, prisoners allowed physical access to the law library are not allowed to browse the shelves. In some facilities, general population prisoners are denied access to the shelves although they are allowed physical access to the law library. Therefore, they must

request legal materials from untrained prisoner law clerks or security officers.¹

Inmates may browse the shelves in the law library at the Rynning unit law library at Florence;² the Florence women's unit;³ Tucson;⁴ the Mohave unit and the Gila unit at Douglas.⁵ None of the inmates have access to the stacks at any of the law libraries at Perryville⁶ or the Kaibab unit at Winslow.⁷

Two lockdown facilities in Florence, SMU and CB-6, have developed "cages" that allow prisoners to sit in the law library area but prevent them from browsing the shelves.⁸ Prisoners in the "cages" at CB6 and SMU must request legal materials from an untrained law clerk.⁹

Defendants argue that vandalism problems justify denial of access to the stacks. Defendants establish that vandalism occurred to legal materials in the Perryville complex.¹⁰ However, it is not clear that this vandalism oc-

¹ Stipulation, 11/15/1991 (hereinafter "Stip."), p. 8, 6d (South unit at Florence; p. 9, 7c (Alhambra); p. 11, 9e (Kaibab unit at Winslow); p. 12, 10e (Coronado unit at Winslow); p. 13, 11e (San Juan unit at Perryville); p. 14, 12a (Santa Cruz unit at Perryville); p. 18, B.

² Doe I testimony, 12/17/1991, p. 253, lines 19-22.

³ McQuillen testimony, 12/19/1991, p. 133, lines 16-18.

⁴ Joyner testimony, 1/15/1992, p. 111, lines 3-7.

⁵ Stip., p. 10, 8e.

⁶ 1/7/1992, p. 94, lines 21-23.

⁷ Ori testimony, 1/15/1992, p. 144, lines 12-21.

⁸ Bishop testimony, 12/17/1991, p. 144, lines 24-25, p. 145, lines 1-10; Tyszkiewicz testimony, 1/7/1992, p. 154, lines 17-24.

⁹ Stip., p. 2, 1d, p. 4, e; p. 18, B.

¹⁰ Cathcart testimony, 1/7/1992, p. 94, lines 21-25, p. 95, lines 1-4; p. 95, lines 10-25, p. 96, lines 1-16; Defendants' Exhibit 834, p. 1-3.

curred because of access to the shelves. In certain facilities where prisoners have been allowed to browse the shelves, legal materials have not been stolen or damaged.¹¹ Further, there is no evidence that allowing prisoners to browse the law library shelves is the cause of missing or damaged legal materials.¹² Rather, the evidence suggests that inadequate staffing may be the cause of missing or damages legal materials.¹³

B. Denial of Physical Access to the Law Libraries

Lockdown prisoners are routinely denied physical access to the law library. Prisoners in lockdown status in most facilities have no physical access to the law library.¹⁴ In order for lockdown prisoners who are denied physical access to the law library to obtain legal materials or a legal assistant, they must send a written request ("kite") to the law library. The legal materials, if available, are sent to the prisoner in his/her lockdown cell.¹⁵ Legal materials are brought to the prisoner in lockdown by ADOC staff, a prisoner legal assistant, or a prisoner law clerk.¹⁶

Staffing, logistics, and the reluctance to mix general population prisoners with lockdown prisoners are the rea-

¹¹ Stip., p. 17, 15b; Joyner dep., p. 34, lines 14-21; Joyner testimony, 1/15/1992, p. 111, lines 3-7; Doe I testimony, 12/17/1991, p. 254, lines 1-3.

¹² Keeney dep., p. 80, lines 3-6.

¹³ Exh. 217, p. 26.

¹⁴ Keeney testimony, 1/27/1992, p. 39, lines 2-7; Wilber testimony, 11/22/1991, p. 122, lines 11-25, p. 23, lines 1-11; *see also* Stip., p. 6, 4e; p. 10, 8d; p. 11, 9f; p. 14, 12c; p. 15, 13d; p. 16, 14e; Joyner dep., p. 7, lines 23-25; Exh. 217, p. 38; Exh. 248ca.

¹⁵ Keeney testimony, 1/27/1992, p. 39, lines 2-7; Wilber testimony, 11/22/1991, p. 122, lines 18-25; Exh. 248ca; Exh. 201; Stip., p. 6, 4e; p. 10, 8d; p. 11, 9f; p. 14, 12c; p. 15, 13d; p. 16, 14e; p. 21, 8b, 9b; Exh. 216, p. 3, 6. 2.4.

¹⁶ Wilber testimony, 11/22/1991, p. 124, lines 14-18; Stip., p. 14, 12c; p. 18, b; Exh. 201; Exh. 216, p. 2, 6.1.10.

sons lockdown prisoners are generally denied physical access to the law library.¹⁷ However, despite these same concerns, prisoners in lockdown in the Rynning unit and the Women's Division in Florence are allowed physical access to the law library and are allowed to browse the shelves.¹⁸

Prisoners in lockdown experience severe interference with their access to the courts. Unless a lockdown prisoner has a pending ADOC charge or outside ("street") case pending, the prisoner is denied access to a legal assistant.¹⁹ Prisoners who are in lockdown status for less than fifteen days may be denied any access to the law library.²⁰ For example, prisoners who are in lockdown in Perryville are by policy not eligible to request legal materials unless they have been in lockdown for more than fourteen days.²¹ In many instances, prisoners in lockdown are denied law books unless they can provide an exact citation.²²

Prisoners in lockdown routinely experience long delays in receiving legal materials or legal assistance. At Perry-

¹⁷ Keeney testimony, 1/27/1992, p. 39, lines 10-25, p. 40, lines 1-3.

¹⁸ Stip., p. 5, 3d; Doe I testimony, 12/17/1991, p. 253, lines 19-20; Powell testimony, 1/7/1992, p. 266, lines 11-13.

¹⁹ McQuillen testimony, 12/19/1991, p. 130, lines 6-11; Booker testimony, 12/18/1991, p. 273, lines 20-25; p. 274, line 1; Exh. 40y.

²⁰ Exh. 794, p. 2, 5.1.5.

²¹ Cathcart dep., p. 31, lines 6-13.

²² Booker testimony, 12/18/1991, p. 270, lines 12-25, p. 271, lines 1-4; Exh. 249ji, Cathcart memo; Exh. 249kd, Cathcart memo; Joyner dep., p. 38, lines 17-19; Wilber testimony, 11/22/1991, p. 124, lines 1-6; Bishop testimony, 12/17/1991, p. 145, lines 19-25; Bartholic testimony, 12/17/1991, p. 200, lines 11-25, p. 201, lines 1-7; Exh. 19fff; Sloboda dep., p. 33, lines 9-18, *but see* Sloboda's contradictory testimony at trial: Sloboda testimony, 1/14/92, p. 107, lines 19-25, p. 108, lines 1-3.

ville, it can take several days, even weeks, for a request for legal material to get to the law library and be filled.²³ At Tucson, lockdown prisoners may wait as long as three to seven days to receive legal materials from the law library.²⁴ At Tucson, lockdown prisoners experience delays in receiving legal assistance from legal assistants.²⁵

²³ Cathcart dep., p. 27, line 25; p. 28, lines 1-5; Exh. 249ja, (waited four days to receive 5 A.R.S.); Exh. 249iz (waited eight days to receive 462 F. Supp.); Exh. 249jc (waited six days to receive 477 F. Supp.); Exh. 249jd (waited five days to receive 94 S. Ct.); Exh. 249jb (waited five days to receive 96 S.Ct.); Exh. 249je (waited nine days to receive 5 A.R.S.); Exh. 249jf (waited nine days to receive one volume of 42 USCA §§ 1983-1984); Exh. 249jj (waited six days to receive 142 Az. 2nd); Exh. 249jk (waited three days for 15 Az. 2d); Exh. 249jl (waited three days for 5 A.R.S.); Exh. 249jm (waited three days to receive 11 A.R.S.); Exh. 249jq (waited three days to receive 5 A.R.S. and a copy of Adm. Rules); Exh. 249jr (waited nine days to receive material on post-conviction remedies, three days after second request); Exh. 249js (waited ten days for 406 F. 2d); Exh. 249ju (waited eleven days for Federal Civil Judicial Procedure and Rules); Exh. 249jw (waited thirteen days for 387 F. Supp. and sixteen days for 655 F.2d 487); Exh. 249jy (waited seven days to receive 104 Ariz. 2d); Exh. 249kd (waited thirteen days to receive 154 Ariz.); Exh. 249ki (waited ten days for the Yellow Pages and the Zip Code book); Exh. 249kl (waited eleven days to receive volumes 827 and 697 of F.2d); Exh. 249iu (waited three days to receive a response to his request); Exh. 249iv (waited three days to receive 84 Federal Practice Digest 3rd); Exh. 249iw (waited nine days to receive 1989 Supplement to Rights of Prisoners).

²⁴ Joyner testimony, 1/15-1992, p. 107, lines 21-25, p. 108, lines 1-6; Exh. 40b (waited four days to receive legal materials); Exh. 40c (waited seven days to receive copies of three cases); Exh. 40d (waited three days or longer to receive a disciplinary rule book); Exh. 40s (waited four and six days, respectively, for legal materials); Exh. 40b (waited four days for legal materials).

²⁵ Exh. 40t (waited seven days for a visit from a legal assistant); Exh. 40v (received no response to his request to see a legal assistant); Exh. 40w (waited four days to receive a visit from a legal assistant); Exh. 40e (waited four days to receive a visit from a legal assistant).

Legal assistants are only sent to the lockdown unit on Monday, Wednesday and Friday nights.²⁶ At Winslow, it can take a week for a request for legal assistance to reach a legal assistant.²⁷ Legal assistants at Winslow are allowed to visit lockdown prisoners only four days a week.²⁸ At Douglas, a lockdown prisoners are denied access to legal materials and legal assistants on Fridays and Saturdays.²⁹

Prisoners in lockdown are restricted in the numbers of books they can receive and the length of time they can keep the material. It has been the practice at Perryville to allow prisoners to receive only one book at a time, to be kept for only twenty-four hours.³⁰ Lockdown prisoners at Tucson are allowed to keep legal materials for only twenty-four hours. Because of this restriction, they tend to request only one or two books at a time.³¹ Even lockdown prisoners who are intelligent, literate and legally trained are unable to do legal research under paging system that allows only one or two books at a time every couple of days. In addition, the legal assistants assigned to lockdown prisoners are not sufficiently skilled to assist them.³²

The vast majority of adult prisoners incarcerated by ADOC have no adequate means to research the law,

²⁶ Joyner testimony, 1/15/1992, p. 108, line 1.

²⁷ Johns testimony, 12/18/1991, p. 102, lines 125.

²⁸ Exh. 255cx.

²⁹ Exh. 205.

³⁰ Cathcart dep., p. 29, lines 24-25, p. 34, lines 7-16; Exh. 249iw (Rights of Prisoners); Exh. 249jc; Exh. 49jo.

³¹ Joyner testimony, 1/15/1992, p. 109, lines 20-25, p. 110, lines 4-12).

³² Wilber testimony, 11/22/1991, p. 124, lines 6-13, 25, p. 125, lines 1-22; McQuillen testimony, 12/19/1991, p. 131, lines 10-15.

crystalize their issues, present their papers in a meaningful fashion, and get them filed in court.³³

C. Illiterate or Non-English Speaking Prisoners

There are prisoners within ADOC custody who are functionally illiterate and who do not have English as their primary language. During a six month period between October 1990 and March 1991, 3,253 prisoners were tested at the reception center. Of these prisoners, 17.2% had a reading level below sixth grade and 14.5% were non-English speaking.³⁴ A system-wide study conducted in 1989 established that 35% of the adult incarcerated population had a reading level of seventh grade or below.³⁵ The trial testimony supported the conclusions of the studies and indicated that there are prisoners who are unable to research the law because of their functional illiteracy or lack of English skills.³⁶

As a result of the inability to receive adequate legal assistance, prisoners who are slow readers have had their cases dismissed with prejudice.³⁷ Other prisoners have been unable to file legal actions.³⁸

³³ Wilber testimony, 11/22/1991, p. 109, lines 14-25.

³⁴ Exh. 835.

³⁵ Exh. 272.

³⁶ Wilber testimony, 11/22/1991, p. 114, lines 12-25, p. 115, lines 1-9, p. 178, lines 1-5, p. 199, lines 3-5; McQuillen testimony, 12/16/1991, p. 115, lines 16-25, p. 116, lines 8-25, p. 133, lines 8-15; p. 128, lines 1-6; Bishop testimony, 12/17/1991, p. 117, lines 13-25, p. 118; Lines 1-25, p. 119, lines 1-11; Harris testimony, 12/18/1991, p. 218, lines 19-25, p. 246, lines 1-5; Tyszkiewicz testimony, 1/7/1992, p. 169, lines 16-20, p. 170, lines 1-18; Friego testimony, 1/9/1992, p. 76, lines 8-14, p. 79, lines 11-13, lines 21-23.

³⁷ Bartholic testimony, 12/17/1991, p. 198, lines 16-25, p. 200, lines 11-25, p. 201, lines 1-9; Exh. 956.

³⁸ Harris testimony, 12/18/1991, p. 218, lines 8-20.

D. Staffing

Many of the law libraries are staffed by security staff and prisoner law clerks.³⁹ In Tucson, there are seven legal assistants at the Santa Rita unit;⁴⁰ two clerks and thirteen legal assistants at the Cimarron unit; one clerk and one legal assistant at the Echo law library; and five law clerks and five legal assistants at the Rincon law library.⁴¹

In Florence, the law library at CB-6 has four prisoner law clerks and three legal assistants;⁴² the SMU library has three law clerks, eleven legal assistants, and one correctional security officer;⁴³ the East unit law library is staffed by one correctional security officer and two law clerks and has seven legal assistants;⁴⁴ the North unit library is staffed by a correctional security officer, two law clerks and one legal assistant;⁴⁵ and the law library at the South unit is staffed by a correctional security officer, three law clerks and nine legal assistants.⁴⁶ The law library at Alhambra is staffed only by two law clerks and two legal assistants.⁴⁷

The law library at Mohave unit at Douglas is staffed by a civilian librarian and three law clerks.⁴⁸

³⁹ Stip., p. 18, B; p. 10, 4a, 5a, 6a, 6b, 7a and 7b; Exh. 217, pp. 25, 43, 49, 65 and 67A; Keeney testimony, 1/27/1992, p. 68, lines 15-25, p. 69, lines 1-4, p. 26, lines 3-8, lines 12-17, p. 34, lines 9-22.

⁴⁰ Joyner testimony, 1/15/1992, p. 100, lines 5-6.

⁴¹ Joyner testimony, 1/15/1992, at p. 101, lines 7-11.

⁴² Stip., p. 18, B1a and b.

⁴³ Stip., p. 19, B2a, b and c.

⁴⁴ Stip., p. 20, B4a and b.

⁴⁵ Stip., p. 20, B5a and b.

⁴⁶ Stip., p. 20, B6a and b.

⁴⁷ Stip., p. 20, B7a and b.

⁴⁸ Stip., p. 21, B8a.

The law library at the Kaibab unit at Winslow is staffed by a civilian librarian, Sue Ori, and three law clerks.⁴⁹ There are five legal assistants but only two are approved to deliver legal materials to lockdown units.⁵⁰ The law library at the Coronado unit at Winslow is staffed by civilian librarians and two law clerks. There are four legal assistants.⁵¹

All the library officers at the law libraries at Perryville are assisted by the librarian at the complex law library.⁵² The head law librarian at ASPC-Perryville, Starla Cathcart, has a master of library science from Brigham Young University.⁵³ The library at the San Juan unit at Perryville is staffed by three law clerks, a correctional security officer and a librarian.⁵⁴ The law library at the Santa Cruz unit at Perryville is staffed by a correctional security officer, two law clerks and one bilingual aide.⁵⁵ The law library at the Santa Maria unit at Perryville is staffed by three prisoner law clerks and a correctional security officer. There is one approved legal assistant for general population and one for lockdown prisoners.⁵⁶ The law library at the San Pedro unit at Perryville is staffed by one correctional security officer and three law clerks. There are two approved legal assistants for disciplinary actions.⁵⁷

The law library at the Arizona Center for Women at Phoenix is staffed by two law clerks and one Department

⁴⁹ Ori testimony, 1/15/1992, p. 142, lines 11-15.

⁵⁰ Stip., p. 21, B9a and b.

⁵¹ Stip., p. 22, B10a and b.

⁵² Cathcart testimony, 1/7/1992, p. 90, lines 15-24.

⁵³ Cathcart testimony, 1/7/1992, p. 79, lines 16-25, p. 80, lines 1-16.

⁵⁴ Stip., p. 22, B11a and b.

⁵⁵ Stip., p. 22, B12a and b.

⁵⁶ Stip., p. 23, B13a and b.

⁵⁷ Stip., p. 23, B14a and b.

of Corrections employee. There are two approved legal assistants.⁶⁸

In Tucson, Bill Streit is the complex librarian.⁶⁹ The law library at the Santa Rita unit is staffed by a law librarian and three inmate clerks.⁶⁰ Ann Joyner, the law librarian at the Santa Cruz Unit at Tucson, has a Master's degree in Library Science from the University of Arizona, and a Bachelor's degree from the University of Florida.⁶¹ The Echo Unit and the Rincon Unit law libraries have full-time law librarians.⁶²

The prisoner legal assistants, law clerks, and civilian library staff are responsible for providing legal services to all prisoners in the facilities. However, law clerks and library staff can assist prisoners only by giving them the requested material from the law library stacks, whereas legal assistants can help them draft pleadings and do other legal work.⁶³ There are an insufficient number of legal assistants available to assist prisoners who need legal assistance.⁶⁴

ADOC recognizes a need for additional librarians, but requests for additional staff have been rejected.⁶⁵ There

⁶⁸ Stip., p. 23, B15a and b.

⁶⁹ Joyner testimony, 1/15/1992 p. 96, lines 7-9.

⁶⁰ Joyner testimony, 1/15/1992, p. 99, lines 11-15.

⁶¹ Joyner testimony, 1/15/1992, p. 94, lines 1-8.

⁶² Joyner testimony, 1/15/1992, p. 100, lines 17-25, p. 101, lines 1-8).

⁶³ Wilber testimony, 11/22/1991, p. 152, lines 8-16; Exh. 216 (ADC Internal Management Policy 302.11), p. 1, 5.2, p. 8, 6.12.1.3; Cathcart testimony, 1/7/1992, p. 115, line 25, p. 116, lines 1-3; Joyner testimony, 1/15/1992, p. 114, lines 17-20.

⁶⁴ Doe I testimony, 12/17/1991, p. 258, lines 13-25, p. 259, lines 1-10; Stip., p. 20, 5b; Johns testimony, 12/18/1992, p. 103, lines 24-25, p. 104, lines 1-7; Exh. 250c; Exh. 250p; McQuillen testimony, 12/19/1991, p. 123, lines 2-4, p. 124, lines 10-19; Bishop testimony, 12/17/1991, p. 111, lines 1-7.

⁶⁵ Keeney dep., p. 69, lines 15-25, p. 70, line 1; Lewis dep., p. 26, lines 3-8.

is a specific need for more library staff to assist in providing library services to prisoners in lockdown at the Perryville facility.⁶⁶

ADOC does not ensure that the law libraries or facilities have Spanish-speaking legal assistants or law clerks.⁶⁷ In many facilities there are no Spanish-speaking legal assistants or law clerks.⁶⁸ The Gila unit at Douglas; Santa Rita Unit at Tucson; CB-6 at Florence; Mohave Unit at Douglas; and the Coronado Unit at Winslow each have one bilingual law clerk.⁶⁹

At the South Unit law library at Florence there is one bilingual law clerk/legal assistant.⁷⁰ At the San Juan Unit law library at ASPC-Perryville, two of the clerks speak Spanish.⁷¹

Most of the prisoners must rely on Spanish-speaking prisoners who are not law clerks or legal assistants to assist them and their legal assistants.⁷² However, frequently these prisoners are unable to comprehend and translate legal terminology.⁷³

⁶⁶ Cathcart dep., p. 69, lines 16-20; Cathcart testimony, 1/7/1992, p. 114, lines 7-17.

⁶⁷ Friego testimony, 1/9/1992, p. 81, lines 24-25, p. 82, line 1; Joyner testimony, 1/15/1992, p. 120, lines 1-13.

⁶⁸ Johns testimony, 12/18/1991, p. 105, lines 23-25; p. 106, lines 1-11; Friego testimony, 1/9/1992, p. 75, lines 21-22; Joyner testimony, 1/15/1992, p. 100, lines 5-16; Cathcart dep., p. 13, lines 1-4; McQuillen testimony, 12/19/1991, p. 115, lines 11-12; Stip., p. 19, 3c; p. 21, 9b; p. 22, 11a and 11b; p. 23, 13a, 13b, 14a and 14b; Exh. 250c; Exh. 40t.

⁶⁹ McQuillen testimony, 12/19/1991, p. 114, lines 12-16, p. 115, lines 1-10; Sloboda testimony, 1/14/1992, p. 92, lines 3-7, lines 13-15; Joyner testimony, 1/15/1992, p. 100, lines 7-16; Stip., p. 21, B8a, p. 22, B10a.

⁷⁰ Stip., p. 20, B6b.

⁷¹ Stip., p. 22, B11a.

⁷² Friego testimony, 1/9/1992, p. 82, lines 5-19; McQuillen testimony, 12/19/1991 p. 115, lines 16-21; Stip., p. 19, 3c.

⁷³ McQuillen testimony, 12/19/1991, p. 115, lines 16-25, p. 116, lines 1-3.

E. Training of staff and inmates

1. Qualifications for inmate legal assistants

In most facilities prisoners apply to the warden to become legal assistants.⁷⁴ These prisoners are not required to meet any specific knowledge or performance requirements pertaining to legal research prior to being approved for the legal assistant position.⁷⁵ Perryville and the Santa Rita Unit at Tucson are the only facilities that have developed tests for prisoners seeking to be law clerks.⁷⁶ However, the tests are not given to all prisoners who apply to be law clerks⁷⁷ and evaluate only the prisoner's knowledge of the library collection but do not test actual research skills, legal analysis and legal writing.⁷⁸

2. Training for inmate legal assistants

The legal assistants and law clerks frequently are not sufficiently skilled to provide prisoners adequate legal services.⁷⁹ ADOC has no training program for prisoners or civilians who provide legal services, with the exception of the court-ordered training in the Florence Central Unit [*Gluth*] and a training program that was developed in July 1990 at the Complex law library in Tucson, a pro-

⁷⁴ Exh. 216, p. 6, 6.9.4.

⁷⁵ Exh. 790, Policy Receipt Newsletter, dated 3/14/91, p. 1, 5.3.

⁷⁶ Cathcart testimony, 1/7/1992, p. 90, Line 25, p. 91, lines 1-2; Joyner testimony, 1/15/1992, p. 101, lines 20-25, p. 102, Lines 1-11.

⁷⁷ Cathcart dep., p. 21, lines 14-23; Joyner testimony, 1/15/1992, p. 112, lines 9-11, p. 113, lines 1-4.

⁷⁸ Joyner testimony, 1/15/1992, p. 113, lines 12-18; Cathcart testimony, 1/7/1992, p. 94, lines 8-11.

⁷⁹ McQuillen testimony, 12/19/1991, p. 128, lines 1-7, p. 129, lines 4-15; Tyszkiewicz testimony, 1/7/1992, p. 185, lines 10-20; Bishop testimony, 12/17/1991, p. 117, lines 13-25, p. 118, lines 1-25, p. 148, lines 17-19; Johns testimony, 12/18/1991, p. 105, lines 7-22; Cathcart testimony, 1/7/1992, p. 108, lines 1-11; Wilber testimony, 11/22/1991, p. 155, lines 3-9; Exh. 217, p. 50.

gram that has not been implemented in all the units in Tucson.⁸⁰ Inmate legal assistants at Tucson were provided an eighteen and a half hour training program by the Department of Corrections.⁸¹ Some of the inmate legal assistants at SMU in Florence have gone through the legal training program offered at the Central Unit pursuant to the *Gluth* decision.⁸² After the filing of this lawsuit, ADOC promulgated a plan to provide law clerks and legal assistants training in the law, but later rescinded the policy.⁸³

Paralegal courses are available for inmates through correspondence or closed circuit television.⁸⁴ Although some law clerks or legal assistants have taken a paralegal correspondence course, there is no system in place to evaluate their work.⁸⁵

Law clerks and legal assistants should be required to take a training course that includes classroom hours in legal research and courses in the substantive law relevant

⁸⁰ Keeney dep., p. 77, lines 12-14, lines 22-24; McQuillen testimony, 12/19/1991, p. 113, lines 7-16, p. 120, lines 21-23; Booker testimony, 12/18/1991, p. 282, lines 11-19; Doe I testimony, 12/17/1991, p. 253, lines 2-4, Cathcart testimony 1/7/1992, p. 108, lines 1-11; Joyner testimony, 1/15/1992, p. 101, lines 23-25, p. 102, lines 1-25, p. 103, lines 1-11, p. 112, lines 9-25, p. 113, lines 1-9, p. 120, lines 3-6; Friego testimony, 1/9/1992, p. 79, lines 6-10; Stip., p. 18, B; p. 12, 9.G; Exh. 200.

⁸¹ Wilbur testimony, 11/22/1991, p. 184, lines 4-5, lines 14-18, p. 185, lines 11-12.

⁸² Tyszkiewicz testimony, 1/7/1992, p. 184, lines 20-25, p. 185, lines 1-4.

⁸³ Lewis dep., p. 66, lines 19-23; Keeney dep., p. 86, lines 4-19; Exh. 50, Executive Staff Meeting Minutes, 6/25/90, p. 4; 7/16/90, p. 2; Exh. 216, 5.3; Exh. 785 5.5.3. and 6.9.2; Exh. 790, Policy Receipt Newsletter, #91-16, dated 3/14/91, p. 1.

⁸⁴ Tyszkiewicz testimony, 1/7/1992, p. 185, lines 13-14, p. 186, lines 20-21.

⁸⁵ Friego testimony, 1/9/1992, p. 79, lines 7-10; Joyner testimony, 1/15/1992, p. 120, lines 3-6.

to prisoners' needs, such as the disciplinary process, warrants, detainers, collateral attacks and civil procedure.⁸⁶ Thus, the eighteen-and-a-half-hour training program provided certain legal assistants in Tucson is insufficient training.⁸⁷

3. Qualifications and training for staff

In order for library staff to provide prisoners with adequate law library services, all of the library staff must be trained in the law.⁸⁸ There is no training provided civilian or security library staff other than that provided in the Central Unit pursuant to *Gluth*.⁸⁹ Although some librarians have training in library science, this is not a requirement. Also, staff is not required to have training in legal research.⁹⁰

F. Contents of the law libraries

The defendants do not assure that library inventories are updated and self-help manuals and other needed legal materials are available to prisoners. There is no one in ADOC who is responsible for monitoring law libraries statewide.⁹¹

The standard library collection that would comply with the "Muecke List" contains at least the United States Code Annotated; Supreme Court Reporter; Federal Reporter Second; Federal Supplements; Shepards U.S. Cita-

⁸⁶ Wilber testimony, 11/22/1991, p. 153, lines 19-25, p. 154, lines 1-9.

⁸⁷ Wilber testimony, 11/22/1991, p. 197, lines 3-11.

⁸⁸ Exh. 217, p. 25, pp. 26-27, p. 35, 2, p. 50, p. 51, p. 54 2, p. 55, p. 67.

⁸⁹ Powell testimony, 1/7/1992, p. 268, lines 17-25, p. 269, lines 1-4; Exh. 217, p. 26-27.

⁹⁰ Keeney testimony, 1/27/1992, p. 33, lines 12-19, p. 68, lines 15-25, p. 69, lines 1-4; Exh. 217, p. 25.

⁹¹ Keeney dep., p. 83, lines 13-19; Cathcart dep., p. 11, lines 9-14.

tions; Shepards Federal Citations; Local Rules for the Federal District Court; Modern Federal Practice Digests; Federal Practice Digest (Second); Arizona Code Annotated; Arizona Reports; Shepards Arizona Citations; Arizona Appeals Reports; Arizona Law-of Evidence (Udall); ADC Policy Manual; 108 Institutional Management Procedures; Federal Practice and Procedure (Wright); Corpus Juris Secundum and Arizona Digest. (Defendants' Exhibit- 785, p. 1; see also, *Wilkinson v. MacDougall*, CIV 81-1397, (Jan. 5, 1984)).

Although defendants now have the "Muecke list"⁹² in most the law libraries statewide, a number of libraries had volumes that were not updated.⁹³ In the Alhambra law library, there was no Shepard's United States Citations 1991 supplement.⁹⁴ In the CB-6 law library, Corpus Juris Secundum was missing pocket parts in various volumes.⁹⁵ In the ACW law library, Federal Practice Digest 3rd and the Arizona Law of Evidence were not current.⁹⁶ At the Santa Maria law library, the Modern Federal Practice Digest was unavailable.⁹⁷ The defendants opened the Rynning Unit in May 1991, but by December 16, 1991 they still did not have certain books required by the *Muecke* list.⁹⁸

Prisoners need additional materials to conduct legal research. Specifically, prisoners need self-help manuals that direct them on substantive and procedural issues to help

⁹² The *Muecke* list is a list of legal books that are required to be in the Central Unit law library. *Wilkinson v. McDougal*, Civ. 81-1397 PHX CAM; See also Exh. 217 p. 27.

⁹³ Stip., p. 2, Ia.

⁹⁴ Stip., p. 9, 7.F.

⁹⁵ Stip., p. 3, Alg.

⁹⁶ Stip., 17, 15f.

⁹⁷ Stip., p. 16, g.

⁹⁸ Doe I testimony, 12/17/1991, p. 252, lines 2-8, p. 254, lines 9-25, p. 2, lines 2-3.

them do legal work.⁹⁹ However, not all of the facilities have self-help manuals. Prisoners had occasion to use self-help manuals because they were the personal property of the law clerk.¹⁰⁰ Legal assistants find they need, but often do not have, Pacific Second to review a case discovered through the shepardizing of an Arizona case; immigration material; and post-conviction manuals.¹⁰¹ Many prisoners are confronted with immigration issues, particularly deportation detainees.¹⁰²

Some of the libraries including Perryville, SMU, CB-6, the East unit, the North unit and the women's unit at Florence; the Santa Rita Unit at Tucson; the Mohave unit and Gila units at Douglas; and the Kaibab unit at Winslow contain self-help litigation manuals including the supplementary pamphlet or the 1983 edition of the *Prisoner's Self-Help Litigation Manual*.¹⁰³ Some of the libraries including Perryville contain the Pacific Second series.¹⁰⁴

Facility administrators have removed from the law libraries legal materials that are not on the "Muecke list."¹⁰⁵

⁹⁹ Bishop testimony, 12/17/1991, p. 148, lines 1-25; Doe I testimony, 12/17/1991, p. 256, lines 22-25, p. 257, lines 1-5; McQuillen testimony, 12/19/1991, p. 116, lines 15-21, p. 117, lines 24-25, p. 118, lines 1-11, p. 128, lines 8-25; Tyszkiewicz testimony, 1/7/1992, p. 156, lines 7-12; Wilber testimony, 11/22/1991, p. 167, lines 8-25; p. 168, lines 1-2.

¹⁰⁰ Doe I testimony, 12/17/1991, p. 266, lines 16-23.

¹⁰¹ Doe I testimony, 12/17/1991, p. 256, lines 7-13; Bishop testimony, 12/17/1991, p. 149, lines 1-21; McQuillen testimony, 12/19/1991, p. 119, lines 8-18.

¹⁰² McQuillen testimony, 12/19/1991, p. 119, lines 5-16.

¹⁰³ Cathcart testimony, 1/7/1992, p. 98, lines 3-18; Tyszkiewicz testimony, 1/7/1992, p. 153, lines 2-7; Joyner testimony, 1/15/92, p. 110, lines 16-18; Stip., p. 3, lines 13-17, p. 5, lines 11-15, p. 7, lines 10-14; p. 10, lines 25-26; p. 11, lines 3-6, p. 11, lines 25-26; p. 12, lines 7-9.

¹⁰⁴ Cathcart testimony, 1/7/1992, p. 98, lines 3-18.

¹⁰⁵ McQuillen testimony, 12/19/1991, p. 120, lines 1-11; Friego testimony, 1/9/1992, p. 80, lines 3-20.

G. Legal supplies/Indigency standard

ADOC's indigency standard prevents prisoners from purchasing necessary legal supplies. The ADOC policy regarding indigency, set forth in Policy 302.11, provides that a prisoner is not provided basic legal supplies at ADOC expense if, at any time during the previous thirty-day period, the prisoner's account balance exceeded twenty-two dollars.¹⁰⁶ ADOC makes no individual evaluation of what the prisoner purchased during the previous thirty-day period in order to assess whether or not the prisoner has a valid need for indigency status.¹⁰⁷ The twenty-two dollar standard was not based on a comparison of the actual average monthly consumption of basic general supplies, including hygiene items and legal supplies, and their cost. Rather, the standard was arrived at by applying an inflation factor to the fourteen-year-old twelve-dollar standard.¹⁰⁸

If the prisoner is granted indigency status and receives legal supplies, the prisoner's account is debited the amount of the legal supplies and the debit is held against the account until funds are available in the prisoner's account to pay off the debt.¹⁰⁹

If the prisoner is denied indigency status, he or she cannot reapply until thirty days after the date his or her account went above the indigency standard.¹¹⁰ Further, Prisoners must reapply for indigency status whenever they are transferred to another facility.¹¹¹

Under the twenty-two dollar standard, if a prisoner purchases basic hygiene and general supplies, such as

¹⁰⁶ Exh. 216, ADC policy no. 302.11, § 6.14.1.

¹⁰⁷ McFadden testimony, 1/8/1992, p. 137, lines 1-5.

¹⁰⁸ Keeney testimony, 1/27/1992, p. 42, lines 21-25, p. 43, lines 1-21.

¹⁰⁹ Exh. 50, Executive staff Meeting Minutes, ASPC-T, 1/20/89.

¹¹⁰ McFadden testimony, 1/8/1992, p. 135, lines 5-13.

¹¹¹ Exh. 790, p. 2, § 5.4.

coffee, that prisoner is unable to purchase needed legal supplies.¹¹² A prisoner could spend twenty dollars on basic supplies.¹¹³ It is not unusual for a prisoner to spend twenty-four dollars at the prison store.¹¹⁴

The appropriate indigency standard cannot be determined without evaluating the actual cost of basic necessities and legal supplies.¹¹⁵ A recent study of the actual cost and prisoner consumption of basic supplies at the Central unit in Florence, resulted in the establishment of a forty-six dollar indigency standard. *Gluth v. Kangas*, 773 F. Supp. 1309, 323 (D. Ariz. 1988), *aff'd*, 951 F.2d 1504 (1991).

H. Photocopy Policy

ADOC's photocopy policy does not ensure that the substance of prisoners' confidential legal materials are not read by other prisoners or staff. Prisoners or library staff photocopy prisoners' confidential legal materials.¹¹⁶ For example, at SMU at Florence, legal documents are copied by putting them under the cell door. An officer will pick up the document and copies will be received back in two to three days.¹¹⁷ Alternatively, an inmate at the law library may request copies. An officer scans the material for the contraband, then an inmate clerk copies the materials.¹¹⁸ In a few units including Perryville, Rynning at Florence and Santa Rita at Tucson, those inmates al-

¹¹² Bishop testimony, 12/17/1991, p. 154, lines 4-21.

¹¹³ McFadden testimony, 1/8/1992, p. 136, lines 3-14.

¹¹⁴ McFadden testimony, 1/8/1992, p. 135, lines 1-3.

¹¹⁵ Wilber testimony, 11/22/1991, p. 169, lines 1-9.

¹¹⁶ Joyner dep., p. 29, lines 1-2; Ori testimony, 1/15/1992, p. 145, lines 9-15; Cathcart dep., p. 40, lines 10-11; Exh. 283, attachment 301.11.; MU, p. 5, § 5.7.3; Exh. 295; Stip., p. 21, § 7d.

¹¹⁷ Bishop testimony, 12/17/1991, p. 151, lines 8-19.

¹¹⁸ Tyszkiewicz testimony, 1/7/1992, p. 162, lines 17-25, p. 163, lines 1-25, p. 164, lines 1-9.

lowed into the library may watch their copies being made.¹¹⁹ Prisoners have observed people reading prisoners' legal documents while copying them.¹²⁰

In addition, the opportunity to breach the confidentiality of legal documents is increased by the delays in receiving photocopies. Prisoners in lockdown in Perryville may wait as long as nine days to have legal materials photocopied. Photocopies in general may take one to two full days.¹²¹ There is a need for posting a policy by the photocopier which states that ADOC civilian or prisoner staff shall not read the substance of a prisoner's confidential legal papers that have been submitted for photocopying.¹²²

I. Attorney/client phone calls

Defendants interfere with prisoners' ability to make confidential attorney-client telephone calls. Prisoners are arbitrarily denied confidential attorney-client telephone calls by restrictive ADOC policies and procedures. If prisoners do not have an attorney of record, they must have court papers that verify that they are representing themselves and have filed an action with the court.¹²³ Prisoners with an attorney of record must substantiate a need for telephonic communication with that attorney or the attorney's agent that cannot be met by utilizing the mail or attorney visitation. Prisoners are advised that calls should be requested and will only be approved in response

¹¹⁹ Cathcart testimony, 1/7/1992, p. 102, lines 13-25, p. 103, lines 1-3; Powell testimony, 1/7/1992, p. 265, lines 16-25; Joyner testimony, 1/15/1992, p. 108, lines 7-21.

¹²⁰ Bishop testimony, 12/17/1991, p. 151, lines 20-25.

¹²¹ Exh. 249kb, memo dated 9/21/1990; Stip., p. 16, § 14d.

¹²² Wilber testimony, 11/22/1991, p. 170, lines 5-13.

¹²³ Exh. 212, p. 3, § 4.4; Exh. 202, p. 3, § 4.4; Exh. 262ds; Exh. 214, Nicholas Cortez, 33601, 1/8/91; Exh. 260ff.

to legitimate pressing legal issues with short time parameters, such as a court-ordered deadline.¹²⁴ If prisoners have not filed an action pro se, or do not have an attorney of record, they are unable to interview a prospective attorney by telephone.¹²⁵

The Correctional Program Officers (CPO) may deny prisoners confidential attorney-client calls because the staff is too busy or because the staff makes a determination that the prisoner's need for a confidential attorney-client call can be handled by written correspondence or by attorney-client visitation.¹²⁶ The CPO is not required to justify in writing a decision to deny a prisoner confidential attorney-client call.¹²⁷

Further, there is no policy requiring a staff person to leave the room while a prisoner is attempting to make a confidential attorney-client call, even when the staff person is able to view the prisoner through a window.¹²⁸ CPOs have refused to leave the room and have remained within hearing range while a prisoner is attempting to make a confidential attorney-client call, even when the staff person is able to view the prisoner through a window.¹²⁹

¹²⁴ Exh. 213, p. 3, § 5.13, 15-13-1; Exh. 214 (form designating attorney of record); Keeney testimony, 1/27/1992, p. 40, lines 20-24; Keeney dep., p. 37, lines 1-7; Exh. 799, p. 4, § 5.3, 5.3.1.2; Exh. 283, attachment ADC-ASPC C-F, SMU, IMP 302.11, p. 4, § 5.7.3; Tyszkiewicz testimony, 1/7/1992, p. 171, lines 21-24; Exh. 207, § 5.1.2, 5.1.2.4, 5.1.2.6; Exh. 209, attachment #1; Exh. 262dr; Exh. 262et; Exh. 214, Jack Barret #55143, 11/15/90, and James Johnson, 11/20/90.

¹²⁵ Booker testimony, 12/18/1991, p. 277, lines 10-15.

¹²⁶ Keeney dep., p. 37, lines 1-7; Keeney testimony, 1/27/1992, p. 41, lines 1-6; Exh. 243adbj; Exh. 66qq.

¹²⁷ Keeney dep., p. 37, 13-18.

¹²⁸ Keeney dep., p. 85, lines 1-25; Keeney testimony, 1/27/1992, p. 42, lines 8-12.

¹²⁹ Keeney dep., p. 85, lines 1-25; Keeney testimony, 1/27/1992, p. 41, lines 20-25, p. 42, lines 1-12; Exh. 244aaf; Booker testimony 12/18/1991, p. 278, lines 1-8, p. 279, lines 8-25; Coley testimony,

ADOC's official policy is based on the belief that the primary means of communication between a prisoner and his attorney should be by written correspondence. Yet, ADOC realizes that prisoners have other issues besides court deadlines necessitating a call to an attorney.¹³⁰ The primary reason ADOC requires justification for a confidential attorney-client call is because the call takes some staff time and the prisoner is using a state phone.¹³¹

Because the Central Office policies provide few objective guidelines for determining when a request for a call should be granted or denied,¹³² facilities and individual staff have developed different policies or procedures, many of which interfere with the right to have confidential telephone contact with an attorney or the attorney's agent.¹³³ The CB-6 policy limits the reasons for an attorney-client call to issues related to a prisoner's sentence.¹³⁴ At SMU, a prisoner's institutional risk score, not his need, will determine how often he is allowed legal call.¹³⁵ At the Central unit in Florence, limitations have been placed on the number of telephone calls prisoners can make per week. Prisoners were allowed one call per week in 1989¹³⁶ and two calls per week in 1990.¹³⁷ No distinction is made between attorney and non-attorney calls.¹³⁸ At the Perryville facility and the Cimarron unit at Tucson, the pris-

12/19/1991, p. 104, lines 2-3, p. 105-106, lines 1-7; Wilber testimony, 11/22/1991, p. 160, lines 12-15; p. 161, lines 12-15.

¹³⁰ Keeney testimony, 1/27/1992, p. 40, lines 20-24.

¹³¹ Keeney testimony, 1/27/1992, p. 41, lines 4-8.

¹³² Wilber testimony, 11/22/1991, p. 160, lines 1-6.

¹³³ Wilber testimony, 11/22/1991, p. 160, lines 1-6.

¹³⁴ Exh. 799, § 4.4.

¹³⁵ Exh. 43x, *see* SMU Orientation Package, p. 2.

¹³⁶ Exh. 262dy.

¹³⁷ Exh. 262ep.

¹³⁸ Exh. 262dx.

oner must tell the CPO the exact nature of the call before the confidential attorney-client call is granted.¹³⁹

Prisoners who cannot satisfy staff that they have need for a confidential attorney-client phone call are forced to speak to their attorney on monitored telephones.¹⁴⁰ This policy significantly diminishes the ability of prisoners to have access to the courts because they are unable to have confidential attorney-client calls.¹⁴¹

II. Post-Filing Changes

The defendants made the following changes relevant to the access to the courts issues after the filing of this lawsuit. A number of the law libraries throughout the state did not have the complete "Muecke list" until after this lawsuit was filed.¹⁴² Further, some facilities had no law library or a limited "resource" library prior to the filing of the lawsuit.¹⁴³

¹³⁹ Coley testimony, 12/19/1991, p. 109, lines 9-17; Exh. 207, § 5.1.1; Exh. 214, Booker #42595, 8/6/90, King #37415, 12/24/90, Burks #80338, 12/17/90, Parker #50912, 2/28/90.

In one instance at the North Unit in Florence, a prisoner who provided ADOC staff with all essential information including an attorney telephone number and evidence of a court deadline and who attempted to arrange the call 48 hours in advance was denied the call because he refused to reveal the exact nature of the problem. Exh. 260gg.

¹⁴⁰ Wilber testimony, 11/22/1991, p. 160, lines 1-11; Celaya testimony 12/17/1991, p. 54, lines 22-25, p. 55, lines 9-20, p. 57, lines 13-19, p. 58, lines 1-5.

¹⁴¹ Wilber testimony, 11/22/1991, p. 163, Lines 4-10.

¹⁴² Exh. 50, Library Inventories, 6/25/90, p. 4; Keeney dep., p. 28, lines 1-25, p. 29, lines 9-19; McQuillen testimony, 12/19/1991, p. 116, lines 8-14.

¹⁴³ Exh. 279, ASPC-PV Warden's meeting minutes, 9/11/30; McQuillen test., p. 113, lines 1-3; Cathcart testimony, p. 111, lines 23-25.

The defendants expanded the law library hours at a number of institutions after the lawsuit was filed.¹⁴⁴ Prior to the expansion of law library hours, prisoners had insufficient time in the law libraries.¹⁴⁵

The defendants also increased the indigency standard or legal access from \$12.00 per 30 days to \$22.00 per 30 days effective March 15, 1991.¹⁴⁶

CONCLUSIONS OF LAW

I. Access to the Courts

Prisoners have a constitutional right of access to the courts that is adequate, effective and meaningful. *Bounds v. Smith*, 430 U.S. 817, 822, 97 S.Ct. 1491, 1495, 52 L.Ed.2d 72 (1977). This right of access to the courts "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds*, 430 U.S. at 828, 97 S.Ct. at 1498. "It is the state's burden to provide meaningful access and to demonstrate that its chosen method is adequate." *Gluth v. Kangas*, 951 F.2d 1504, 1508 (9th Cir. 1991), citing *Storseth v. Spellman*, 654 F.2d 1349, 1352 (9th Cir. 1981). Prisoners alleging interference with their access to the courts need not allege "actual injury" if one of the core requirements under *Bounds* is involved. *Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989). Adequacy of legal assistance is such a core requirement. *Id.*

The prison may preclude physical access to segregated inmates if such access would interfere with institutional

¹⁴⁴ Exh. 50, Executive Staff Meeting Minutes, dated 11/13/1990, p. 4, Exh. 216, effective March 15, 1991, p. 3, § 6.2.3; Exh. 231.

¹⁴⁵ Exh. 279, Warden's minutes, ASPC-PHX, August 1, 1989; Exh. 250r; Exh. 252k; Stip., p. 4, 2d, p. 15, 13d.

¹⁴⁶ Exh. 216, p. 9, § 6.14.1, Keeney testimony, 1/27/1992, p. 42, lines 13-25, p. 43, lines 1-8.

security.¹⁴⁷ *Toussaint v. McCarthy*, 801 F.2d 1080, 1109 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069, 107 S.Ct. 2462, 95 L.Ed.2d 871 (1987). *See also*, *Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir. 1990); *Lindquist v. Idaho St. Bd. of Corrections*, 776 F.2d 851, 858 (9th Cir. 1985). However, if the state denies physical access to the law library, the state must provide that prisoner with legal assistance. *Toussaint*, 801 F.2d at 1110. The *Bounds* court listed several alternatives to physical access including the training of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals and law students, volunteer attorneys, or staff attorneys working with prisoner legal assistance organizations. *Bounds*, 430 U.S. at 831, 97 S.Ct. at 1499-1500. The legal access program need not include these particular elements but must be evaluated as a whole. *Bounds*, 430 U.S. at 831, 97 S.Ct. at 1499-1500. "*Bounds* requires, in the absence of adequate law libraries, 'some degree of professional or quasi-professional legal assistance to prisoners.'" *Gluth*, 951 F.2d at 1511.

A "paging system," in which a prisoner who is denied direct access to the law library is allowed to request that legal materials be brought to his or her cell, does not provide adequate access to the courts. In *Toussaint*, the Ninth Circuit accepted the prisoners' contention that a paging system that allowed a prisoner to order five books per week was constitutionally deficient:

Simply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful change [sic] to explore the legal remedies that he might have. Legal research often requires browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the face of unfamiliar adverse

¹⁴⁷ Generalized security concerns are insufficient to support a denial of physical access to the law library. *DeMallory v. Cullen*, 855 F.2d 442, 448 (7th Cir. 1988).

precedent. New theories may occur as a result of a chance discovery or an obscure or forgotten case. Certainly a prisoner, unversed in the law and the methods of legal research, will need more time or more assistance than the trained lawyer exploring his case. It is unrealistic to expect a prisoner to know in advance exactly what materials he needs to consult.

Toussaint, 801 F.2d at 1109-10, quoting *Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978), *cert. denied*, 441 U.S. 911 (1979). *See also* *Griffin v. Coughlin*, 743 F. Supp. 1006, 1019-25 (N.D.N.Y. 1990) (paging system that allows two books a day is inadequate).

Untrained prisoner legal assistants cannot provide constitutionally sufficient access to the courts for prisoners denied access to a law library. *Gluth*, 951 F.2d at 1508.¹⁴⁸ "*Bounds* requires the assistance of those 'trained' in the law; the appearance of minimal capacity to assist other inmates alone plainly does not suffice." *Gluth*, 951 F.2d at 1508. Although legal training need not be extensive, *Bounds* does require that inmates be provided the legal assistance of persons with at least some training in the law." *Gluth*, 951 F.2d at 1511.

Moreover, even the best law library is of no use to prisoners who are functionally illiterate in English. *Cruz v. Hauck*, 627 F.2d 710, 721 (5th Cir. 1980). Library books, even if adequate in number, cannot provide access to the courts for those persons who do not speak English or who are illiterate. *Id.* *See also*, *Valentine*, 850 F.2d at 957; *U.S. ex rel. Para-Professional Law Clinic v. Kane*,

¹⁴⁸ *See also*, *Valentine v. Beyer*, 850 F.2d 951, 956-57 (3rd Cir. 1988); *DeMallory*, 855 F.2d at 447; *Walters v. Thompson*, 615 F. Supp. 330, 340 (D.C.Ill. 1985); *Cody v. Hillard*, 599 F.Supp. 1025, 1061 (D.S.D. 1984); *Canteriono v. Wilson*, 562 F.Supp. 106, 110-111 (W.D.Ky. 1983); *Wade v. Kane*, 448 F.Supp. 678, 683 (E.D. Penn. 1978).

656 F. Supp. 1099, 1105-07 (E.D. Pa. 1987), *aff'd without opinion*, 835 F.2d 285 (3d Cir. 1987); *cert. denied nom. Zimmerman v. Para-Professional Law Clinic*, 485 U.S. 993 (1988); *Cody*, 599 F. Supp. at 1061; *Caterino*, 562 F.Supp. at 110.

Meaningful access to the courts requires direct assistance for prisoners who because of language factors or lack of access to the law library, or for other reasons are unable to perform adequate legal research and writing. In the absence of a program providing such prisoners with lawyers or paralegals, ADOC must maintain a sufficient number of at least minimally trained prisoner legal assistants. *Gluth v. Kangas*, 773 F. Supp. 1309, 1318-19 (D. Ariz. 1988), *aff'd*, 951 F.2d 1504 (9th Cir. 1991). In *Gluth*, this Court ordered [for the Central Unit in Florence] the development of a legal research and writing course that must be successfully completed by all legal assistants. The work of legal assistants was to be supervised on a continuing basis by the legal research instructor. *Gluth*, 773 F.Supp. at 1319-20. Clearly, the law requires for those prisoners denied physical access to the law libraries [either because they are in lockdown, illiterate or non-English speaking or are denied access to the books within the law libraries] the defendants must provide trained legal assistants. The evidence in this case establishes that the legal assistants provided by the ADOC are not trained sufficiently to meet the *Bounds* requirements. Locked down, illiterate or non-English speaking inmates must rely on an inadequate number of inmate clerks with no formalized training or supervision by attorneys. Such a system fails to comply with the requirements of *Bounds*. *Valentine*, 850 F.2d at 956-57.

II. Law library staffing

To provide adequate access to the courts, a law library must be staffed by a person with adequate legal training; a law library staffed only by security officers untrained

in legal research and writing is not sufficient.¹⁴⁰ Therefore, this court in *Gluth* [Central Unit in Florence] ordered defendants to provide at least one full-time professionally trained librarian at the Central Unit law library, as well as adequate secretarial support. *See Gluth*, No. CIV 84-1626-PHX-CAM, Order, July 9, 1991, p. 4; *See also Peterkin v. Jeffes*, 855 F.2d 1021, 1038 (3rd Cir. 1988) (death row prisoners who are denied direct access to law library must have assistance from attorneys for post-conviction and civil rights filings); *Valentine*, 850 F.2d at 956 (prisoner paralegals who are not provided continuing legal education cannot provide adequate access to prisoners who were denied direct access to law library); *Carter v. Fair*, 786 F.2d 433, 434 (1st Cir. 1986) (meaningful access provided where attorneys were available to prisoners who were denied direct library access). The Court also ordered that prisoner law library clerks, in order to perform their duties adequately, must successfully complete the same legal research course as prisoner legal assistants. *Gluth*, 773 F. Supp. at 1318.

III. Indigent Standard/Supplies

Indigent prisoners must be provided sufficient legal supplies and services to ensure meaningful access to the courts. *Bounds*, 430 U.S. at 824. A policy which forces inmates to choose between purchasing hygienic supplies and essential legal supplies is unacceptable. *Gluth*, 951 F.2d at 1508.

In *Gluth*, this Court ordered that a prisoner in the Central Unit in Florence is eligible for basic legal supplies and services if he has less than \$46.00 in his account at the time of the request. *Gluth*, 773 F. Supp. at 1324. The Ninth Circuit affirmed, noting that "[t]he

¹⁴⁰ Indeed, defendants themselves concede this. For example, in a memo dated October 30, 1989, J. C. Keeney, Assistant Director for Adult Institutions, directed that "[e]ach library shall have a trained librarian." Exhibit 1 to Keeney dep.

uncontroverted facts show that it costs at least \$46 to purchase necessary personal items and legal supplies and that inmates must purchase hygiene items to avoid punishment under prison regulations." *Gluth*, 951 F.2d at 1508.

In this case, the ADOC established the \$22 indigency standard by applying an inflation factor to the 14-year old \$12 standard.¹⁵⁰ The standard is not based on actual costs of hygiene items. Under this \$22 standard, a prisoner cannot purchase both hygiene items and legal supplies. Clearly, the \$22 standard is insufficient to insure that indigent prisoners receive sufficient legal supplies.

IV. Contents of the law libraries

After the filing of this action, the defendants expanded their resources in the law libraries. Generally, the facilities appear to have complete libraries.¹⁵¹ Some of the libraries contain, and all of the libraries should contain, copies of prisoner self-help manuals. Without self-help manuals, prisoners who are untrained in the law cannot use the legal books in the libraries and the defendants have not provided "meaningful" access to the courts. It also appears that the Pacific Digest and Reporters may be necessary for the inmates to pursue their cases.

V. Photocopy Policy

Because the photocopy policies allow staff or other inmates to photocopy a prisoner's confidential legal information, the confidentiality of legal documents is breached

¹⁵⁰ The Court notes that inmates are not given supplies. The cost of the supplies is debited to the inmates' accounts. Thus, if the inmate ever has money deposited to the account, ADOC recovers the cost of the legal supplies.

¹⁵¹ The Court takes judicial notice of the fact that this federal court donates to the Arizona prison system its advance sheets, paperback reporters and older editions of books to help lower costs for the state prison system.

by staff or other inmates. Staff, who may be named defendants in civil rights actions, have access to confidential legal materials of inmates. For these reasons, the prison needs a policy to assure that legal documents to be photocopied remain confidential and are not read by other inmates or staff.

VI. Legal telephone calls

Prisoners must have a reasonable opportunity to seek and receive the assistance of attorneys for civil as well as criminal matters. Therefore, regulations and practices that unjustifiably restrict the availability of professional representation are invalid. *Procunier v. Martinez*, 416 U.S. 396, 419, 94 S.Ct. 1800, 1814-15, 40 L.Ed.2d 224 (1974) (ban on attorneys' use of paralegals and law students to interview prisoners). Reasonable access to telephones is an important component of a prisoner's right of access to courts and counsel. See *Divers v. Department of Corrections*, 921 F.2d 191, 194 (8th Cir. 1990) (allegation that prisoners were permitted to telephone an attorney only if they had a court appearance within 30 days stated a claim); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1052 (3th Cir. 1989) (allowing prisoners only one attorney call every two weeks, and counting calls as made when the attorney was not reached, is "patently inadequate"). "[T]he ability of counsel to visit the jail cannot always compensate for an inmate's initial inability to ask an attorney to visit. Worse yet, inmates who have not yet retained an attorney are obviously prejudiced if they can only make one call during business hours every two weeks." *Johnson-El*, 878 F.2d at 1052.

Moreover, effective access to attorneys in the prison context requires that the traditional privacy of the attorney/client relationship be protected. See *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990) ("The opportunity to communicate privately with an attorney is an important part of meaningful access to the courts."). "Forcing pris-

oners to conduct their meetings with their attorneys in the open or to yell over the phone obviously compromises the consultation." *Johnson-El*, 878 F.2d at 1052. Thus, in *Gluth*, this Court reminded defendants of their obligation "to facilitate confidential and privileged contacts between Central Unit prisoners and outside lawyers, authorized paralegals, legal organizations, governmental agencies and courts, through regular visits and adequate use of telephones and mails." 773 F. Supp. at 1321. See also, *Dawson v. Kendrick*, 527 F. Supp. 1252, 1313-14 S.D.W.Va. 1981) (failure to provide sufficient and regular telephone service in the jail operates to deprive prisoners of their right to have a reasonable opportunity to seek and receive the assistance of attorneys).

In this case, the prisoners are arbitrarily denied confidential attorney-client phone calls. The lack of a Central office policy allows individual prisons to set arbitrary standards that allow for improper denial of calls to counsel. Prison staff are not required to justify the denial in writing. In addition, prisoners are forced speak to their attorneys on monitored lines or within hearing range of prison staff. Thus, inmates are denied access to the courts.

Injunctive Relief

Because the defendants' system fails to comply with constitutional standards, the Court has determined that injunctive relief is appropriate for the access to the courts issues.

Many of the issues in this case have been resolved for the Central Unit in Florence by the Special Master [Dan Pachoda] and his assistant [Janet Bliss] appointed in the *Gluth* case. In addition, the Ninth Circuit has affirmed the resolution of those issues. Therefore, the Court intends to appoint Dan Pachoda as Special Master and Expert and Janet Bliss as Assistant Special Master to work with the parties and develop the proper injunctive

relief. A detailed order will follow setting forth the duties of the Special Master.

For those issues that have been resolved successfully in *Gluth*, the Court intends to implement the *Gluth* policies statewide, with any modifications that the parties and Special Master determine are necessary due to the particular circumstances of the prison facility. For the remaining issues not addressed in *Gluth*, the Special Master and his assistant will work with the parties to develop the proper injunctive relief for plaintiffs.

Dated this 13 day of November, 1992.

/s/ C.A. Muecke
C.A. MUECKE
U.S. District Judge

APPENDIX C

[Filed Oct. 13, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 90-0054 PHX CAM
No. CIV 91-1808 PHX CAM
(consolidated)

FLETCHER CASEY, *et al.*,
Plaintiffs,
vs.

SAMUEL A. LEWIS, *et al.*,
Defendants.

ORDER

Having considered the Special Master's proposed permanent injunction, the Court concludes as follows:

This Court issued Findings of Fact and Conclusions of Law for the access to the courts issues in this case on November 13, 1992, finding violations of the inmates' constitutional rights to access to the courts and that injunctive relief was appropriate. In that order the Court further stated:

Many of the issues in this case have been resolved for the Central Unit in Florence by the Special Master [Dan Pachoda] and his assistant [Janet Bliss] appointed in the *Gluth*¹ case. In addition, the Ninth Circuit has affirmed the resolution of those issues.

¹ See *Gluth v. Kangas*, 773 F.Supp. 1309 (D. Ariz. 1988), *aff'd*, 961 F.2d 1504 (9th Cir. 1991).

Therefore, the Court intends to appoint Dan Pachoda as Special Master and Expert and Janet Bliss as Assistant Special Master to work with the parties and develop the proper injunctive relief. A detailed order will follow setting forth the duties of the Special Master.

For those issues that have been resolved successfully in *Gluth*, the Court intends to implement the *Gluth* policies statewide, with any modifications that the parties and Special Master determine are necessary due to the particular circumstances of the prison facility. For the remaining issues not addressed in *Gluth*, the Special Master and his assistant will work with the parties to develop the proper injunctive relief for plaintiffs.

On November 25, 1992, this Court issued an order setting forth the duties of the Special Master and the parties in formulating and implementing the permanent injunction. The Order provided, in pertinent part:

- (2) *The Special Master shall have the following Responsibilities:*
 - (a) The Special Master shall formulate the injunctive relief necessary to remedy the constitutional violations relevant to the access to the courts issues in this case and monitor the implementation of that injunctive relief.
 - (b) For those issues resolved in *Gluth*, the Special Master shall implement the injunctive relief set forth in *Gluth v. Kangas*, [Exhibit A], with modifications deemed appropriate because of the particular circumstances of the facility. Exhibit A, a compilation of the orders in *Gluth*, sets forth the specific injunctive relief ordered in that case.

No later than January 22, 1993, the parties shall file written objections, if any, setting forth their objections to implementation of the *Gluth* injunction in particular facilities. The objections shall set forth the particular provisions of the injunction to which they object; propose modifications to the injunction and set forth the particular circumstances that require modification of the injunction. The particular needs or circumstances must be documented and supported by evidence.

- (c) For those issues not resolved in *Gluth*, the Special Master shall meet with the parties, obtain their input on the form of injunctive relief, and propose the final injunctive relief.
- (d) In formulating his proposals for a permanent injunction, as provided for in the preceding paragraph, the Special Master, in addition to his own inquiry, shall:
 - (1) Meet with inmates, appropriate Arizona Department of Corrections personnel and counsel to make whatever reasonable inquiry necessary to evaluate ways to insure adequate access to the courts.
 - (2) Report his conclusions to the parties and this Court at such time as will be fixed by the Court after consultation with the Special Master and the parties. The Special Master will be available to provide testimony about his final report at a hearing to be scheduled by the Court to enable the parties and the Court to cross-examine

the Special Master for the record and to assist the Court in determining the language and content of the permanent injunction.

- (3) Have all powers necessary to carry out these functions including but not limited to the power to compel attendance of the parties at negotiating sessions, and to have access to documents and necessary ADOC personnel and inmates.
- (4) File his report(s) with the Clerk of the Court and shall file any proceedings that are transcribed, and the original exhibits, and any other evidence. The Clerk shall immediately mail notice of the filing to all parties.
- (5) When a party so requests, make a record of the evidence offered and excluded at any hearing conducted by the Special Master.
- (6) Proceed with all reasonable diligence in conducting hearings and investigations necessary for compliance with the Court's order.
- (e) The Special Master shall file periodic written reports to the Court and shall file a final written report of his findings, conclusions, and recommendations no later than July 1, 1993.
 - (1) The Special Master shall include in his final report to the Court and the parties, the language he proposes that the Court should use in the form of a permanent injunction to keep in place

for the future, i.e., such procedures as needed to provide for and allow continued access to the courts by the class members.

- (2) The Court will subsequently conduct hearings that it deems necessary to determine the language of the final injunction.
- (3) The parties involved may procure the attendance of witnesses before the Special Master by the issuance and service of subpoenas, and may offer testimony and witnesses in support or opposition, and may cross-examine opposing witnesses. This does not preclude any party from objecting to the subpoena and raising any legitimate defenses subject to the ruling of the Special Master.
- (4) Within ten days after being served with notice of the filing of the Special Master's report, any party may serve written objects thereto upon the other parties and the Court. The Court may accept, or may modify or reject the report after examination of the report and the objections, or may receive further evidence.
- (5) The special master will be available to provide testimony about his findings, conclusions, and recommendations at hearings scheduled at the request of the parties, special master, or Court to determine the parameters of the final order.

- (6) The special master shall have all powers necessary to carry out these functions including access to underlying documents, prison records, and other information, cooperation from ADOC personnel, and contact with prisoners.
- (7) The Court will describe any continuing duties of the special masters when it issues its final judgment. However, the special master may also make recommendations as to what these continuing duties should entail.
- (8) All costs and expenses, including a reasonable compensation for the responsibilities of performing the duties of special master shall be covered by defendants.

In addition to the January 1993 objections, the Special Master allowed further objections and considered those objections through September of 1992. Plaintiffs and defendants filed objections and met with the Special Master in January and April of 1993 to negotiate the language for the proposed order. The Special Master lodged the proposed permanent injunction on July 12, 1993. The parties were allowed to object to the final proposed order. The Special Master has incorporated many of the objections of the parties into that proposed order² and lodged the final proposed permanent injunction.

Having reviewed the final proposed injunction, the Court has determined that the injunction is appropriate and that the parties have been allowed sufficient input into the final injunction.³

² For explanation of the objections and their outcome, see the Commentary beginning on page 25 of the proposed order.

³ As emphasized by the Court in previous orders, during implementation of the order, the Special Master may suggest modifica-

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IT IS THEREFORE ORDERED THAT the permanent injunction, as proposed by the Special Master, is adopted by the Court.

DATED this 8 day of October, 1993.

/s/ C.A. Muecke
C.A. MUECKE
U.S. District Judge

tions to the injunction as he deems appropriate. Therefore, if implementation of a particular portion of the injunction proves unworkable, plaintiffs or defendants should raise the problems with the Special Master or Assistant Special Master.

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[Filed Oct. 13, 1993]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CIV 90-0054-PHX-CAM
(Lead)

No. CIV 91 1808-PHX-CAM
(Consolidated)

FLETCHER CASEY, JR., *et al.*, on behalf of themselves
and all others similarly situated,
Plaintiffs,
v.

SAMUEL A. LEWIS, Director
Arizona Department of Corrections, *et al.*,
Defendants.

CHARLES L. ARNOLD, guardian ad litem
on behalf of H.B.,
Plaintiff,
v.

SAMUEL LEWIS, Director; MARY VERMEER, Deputy Warden, Santa Maria—Perryville; DAVID FERNANDEZ, M.D., Arizona Department of Corrections, in their official capacities,
Defendants.

PERMANENT INJUNCTION ACCESS
TO THE COURTS ISSUES

INTRODUCTION

The recommended permanent injunction with commentary is enclosed. Plaintiffs and defendants seek a quick decision based on the present inputs. Neither side

requests an evidentiary hearing or argument before the Court.

Following extensive fact-finding, a proposed permanent injunction was filed on July 12, 1993. The parties were given opportunity to submit comments on any proposed changes (as compared to the *Glush* language), or to re-emphasize previously requested modifications. The comments were due July 30, 1993.

Plaintiffs' response is attached (App. "A"). On July 27, defendants informed the Special Master that ADOC personnel were still circulating the proposed order for comment. After reiterating that the instant response was not intended for new objections to the *Glush* language, the Special Master granted an extension to August 13.

Defendants' response is attached (App. "B"). As noted in plaintiffs' motion to dismiss (App's. "C", "E"), and recognized by the Court (App. "F"), most of the specific requests involve matters that should have been investigated and resolved during the appropriate January-to-June period. Additionally, the requests rely on conclusory and unsupported allegations.

After receipt, the Special Master told the parties that proper consideration of these requests required a re-opening of the investigation to enable all involved to adequately assess their validity. Plaintiffs and defendants opposed this delay. They were also aware of the possibility of modifications after implementation based on demonstrated need.

Defendants' counsel contended that given the steps triggered by previous requests, including the numerous trips to ADOC facilities and discussions with personnel, the Special Master should be in position to quickly evaluate the new requests. However, not only is a more complete picture necessary, but the available information indicates that defendants' present conclusions are not supported by the known facts.

For example, the collected data apparently demonstrates that: the majority of facility yards do not close for all prisoner activity by 8:30 p.m.; photocopies cost less than five cents per page; one trained librarian for every three law libraries is inadequate; any vandalism of library books is not primarily attributable to access to the stacks; and it is possible to allow the required weekly meetings with Legal Assistants, the daily exchange of materials for persons denied library access, and brief messages from attorneys.

The Special Master has always responded to demonstrated security problems. However, such labels in defendants' submission are not consistent with ADOC practices. As one example, even at CB6, a maximum security unit that includes death row, prisoners have been given advance notice of their scheduled library visits and permitted to continue to use typewriters with "memory", including those provided in the library.

The Special Master's first-hand knowledge proves that defendants' assertions of impossibility with regard to finding librarians with para-legal degrees are baseless. Even brief contact with local schools, for example, by the Special Master's office produced qualified applicants; defendants chose not to follow up. Given the low salary, it is predictable that persons with a para-legal degree requiring two years after high school are more readily available than those whose library science degree required five or six years.

The Order. The requirements in the enclosed Order repeat or closely track those in the July 12 submission. Questions raised by the parties resulted in some language changes to more accurately reflect the intent. A few additions clarified understandings of the *Glush* parties that were not incorporated in that final injunction. These include the limited ability to assign a law librarian to a second facility (recently requested in *Glush* by defend-

ants), and the basic prohibition on the use of uniquely onerous conditions to "chill" prisoner access (*see*, I.A. and commentary).

Finally, language concerning disclosure of information received from a prisoner by a Legal Assistant has been omitted pending review and suggestions from the parties. Recent decisions indicate a potential conflict between the *Gluth* formulation and fundamental state due process rights. [E.g., *State v. Melendez*, 172 Ariz. 68, 834 P.2d 154 (1992) (Sup. Ct. of Ariz., en banc)].

ORDER

The Arizona Department of Corrections (ADOC) shall provide meaningful access to the Courts for all present and future prisoners. The practices and procedures set out below will achieve this constitutional mandate. They concern those areas raised by or necessarily implicated in this litigation and incorporate approaches utilized by ADOC administrators.

I. THE LAW LIBRARIES

With the exception of the existing Aspen DWI and Flamenco Units at ASPC—Phoenix, the Papago DWI and Maricopa Units at ASPC—Douglas, and the Picacho Unit at ASPC—Florence, each ADOC facility with a population or capacity of 150 or more shall contain a fully equipped law library. Each library shall have sufficient seating capacity and be open for sufficient periods to enable adequate research and compliance with this Order.

A. ACCESS

ADOC prisoners in all housing areas and custody levels shall be provided regular and comparable visits to the law library. This opportunity may be postponed on an individual basis because of the prisoner's documented inability to use the law library without creating a threat to safety or security, or a physical condition if determined by medical personnel to prevent library use. Upon request, a prisoner will be permitted a minimum of ten hours of actual law library use each week; additional time shall be allowed if necessary to meet a filing or other legal deadline.

Law library access shall not be reduced or discouraged by unnecessarily onerous conditions or retaliatory practices. Prisoner access to the law library shall be on terms equivalent to those for participation in other congregate activities at the facility such as classes, jobs and meals, and shall not occasion unique hardships including, but

not limited to, regular strip searches of library users and automatic disciplinary write-ups for missed library visits.

B. *SCHEDULE*

1. *Library Hours*

a. Facilities that do not require advance requests for a library turn-out:

The law library shall be open for prisoner use at least 50 hours each week. This schedule shall involve hours between 7:00 a.m. and 10:00 p.m., and include at least four hours each week night between 5:00 p.m. and 10:00 p.m., and at least five hours between 7:00 a.m. and 10:00 p.m. on Saturday and on Sunday.

b. Facilities that require advance requests for a library turn-out:

The law library shall be open for prisoner use at least 60 hours each week if the facility population and capacity are less than 400, for at least 70 hours each week if either is between 400 and 700 and neither over 700, and at least 80 hours per week if either is over 700. These schedules shall involve hours between 7:00 a.m. and 10:00 p.m., and include at least four hours each week night between 5:00 p.m. and 10:00 p.m., and at least eight hours between 7:00 a.m. and 10:00 p.m. on Saturday and on Sunday.

2. *Prisoner Use*

In all facilities, each visit or turnout must provide the prisoner a minimum of two hours of actual library use. Facilities that do not require advance requests shall provide sufficient library periods that are free of conflicts for all prisoners to have this opportunity; these facilities do not have to change the scheduled closing time for late arrivals. Every prisoner will sign the log book at the law library to indicate the time of arrival at and departure

from the library; copies of the log book pages shall be maintained for the Special Master.

If more than one reading room is utilized, a prisoner may choose which room to sit in, provided that the rooms are not reserved for different custody levels and no other documented security considerations exist. This choice is subject to the need to maintain comparable numbers in each room, although a prisoner shall be allowed to sit with any prisoner providing legal help even if not a "Legal Assistant".

3. *Notice*

At least one week prior to the end of each month ADOC shall make known to all prisoners (a) the law library schedule of hours and turnouts for the next month, and (b) the specific schedule of important activities at the facility for the next month, including visiting hours, classes, religious services, and field turnouts for each housing area; this is not required for those items whose schedule (days and hours) remains the same in the upcoming month.

Within two months of entry of this Order, for each facility ADOC shall provide the Special Master (a) the weekly law library schedule and, if applicable, the specific turnouts or sessions for different custody levels or housing areas, (b) the names of the security and civilian employees assigned to the law library with their specific hours, (c) the names of the prisoner law clerks with their specific hours, (d) the names of the prisoner Legal Assistants, and (e) the schedule of ongoing activities that might conflict with law library access, including work assignments, classes, recreation, religious services, commissary, visiting and meals.

C. *ADVANCE REQUEST PROCEDURE*

When advance requests are used, prisoners shall be responsible for selecting their law library turnouts and for

depositing their requests directly in the appropriate receptacle; this requires that ADOC provide timely and adequate information, forms, and access to receptacles.

The first library turnout requested by a prisoner must be at least three days after the day the form is deposited; this shall be less if necessary to meet a legal deadline. The week referred to in I (A) begins the day of the first scheduled turnout, and at least ten hours of library use shall be permitted during this seven-day period.

Defendants shall provide adequate notification to prisoners of the above procedures and timetables, including posting in each cell block. The Special Master, in consultation with plaintiffs and defendants, shall analyze the library and turnout schedules, including those periods regularly revealing below average attendance, and ascertain whether any alterations are required for adequate access.

1. *Forms*

ADOC shall develop law library turnout and legal assistance request forms and have them regularly available in the housing areas and law library for distribution to prisoners. The law library form should minimally include space for the date submitted and for the selection of specific library turnouts and alternates for up to two weeks, and to detail any filing or other legal deadline. Any such deadline should be verified by relevant documentation possessed by the prisoner, or by a description of this information and explanation of why it is not available.

2. *Receptacles*

ADOC shall maintain secure, tamper-resistant receptacles for law library and other legal assistance requests from prisoners. These receptacles must be easily accessible to prisoners in all housing areas and custody levels on a daily basis.

D. *ADVANCE RESPONSE PROCEDURE*

Law Library staff or clerks shall collect the prisoner law library and other legal assistance forms from each deposit point at least once every day. ADOC must develop procedures for scheduling law library turnouts that provide adequate notice and access for all eligible prisoners with preference for those with filing or other legal deadlines, and that insure compliance with this Order. This minimally requires that law libraries requiring advance scheduling be equipped with a computer that is regularly and primarily used for this purpose.

Denial of a particular turnout may be based on a lack of available library space for that period, or on a finding that the requesting prisoner and a prisoner previously scheduled for that period cannot be together in the library without creating a serious threat to safety or security. If a denial occurs, the prisoner shall be given preference on the remaining requests or a timely opportunity to make additional requests if necessary to meeting the weekly ten-hour minimum requirement.

A prisoner shall be provided written notification of his or her scheduled law library turnouts and of any denied with the reason for the denial, and given the opportunity to make additional requests if necessary. This notice must reach the prisoner at least 24 hours before the time of the first requested turnout whether this was granted or denied. Copies of the names or total number of prisoners scheduled for each turnout, and of the number or percent of those who attended, will be kept at the law library for collection by the Special Master, as will copies of turnout denials.

E. *LAW CLERKS*

ADOC shall provide a sufficient number of law library prisoner law clerks to permit adequate assistance for prisoners using the library and for those ineligible for such

use, including Spanish-speaking prisoners in both categories. This assistance includes providing elementary information about the content and purpose of the books and materials in the library, and about researching specified issues and locating relevant decisions, statutes, regulations and forms. In order to adequately perform this basic function, law clerks must successfully complete the legal research course, described in II (D) below, either prior to beginning work or the first time it is available. In contrast to Legal Assistants, law clerks shall provide guidance to all eligible prisoners, although such guidance is limited in scope and does not extend to the preparation of legal documents for others.

For each session or turnout, at least two law clerks per reading room shall be assigned to provide the court-ordered research assistance in the room and, if applicable, book retrieval for that room. Prisoners with research experience and ability shall be solicited and favored for the law clerk positions by the relevant institutional committees and administrators.

F. RESEARCH GUIDE

The Special Master will oversee the preparation of an introductory guide to the use of the law library in Spanish and English, with brief explanations of the contents and use of the available resources and elementary research assistance on the most common legal issues. Plaintiffs and defendants will review the proposed introductory guide and have an opportunity to comment. After final approval by the Special Master, this guide shall be printed by defendants and made available to all requesting prisoners while attending the law library.

G. LIBRARIAN

ADOC shall provide at least one full-time professionally trained librarian at each law library with adequate secretarial support for the librarian and law library. A law

librarian may be assigned to a second facility provided that the population in that facility is less than 200. Subject to identified security needs, the librarian will be responsible for the policies and procedures in the law library and for insuring adequate prisoner access to the courts.

The librarian must possess a library science degree, law degree or paralegal degree. Preference shall be given to applicants with a law or paralegal degree, and each ADOC complex shall minimally employ at least one such librarian. The Special Master will work with ADOC on securing applicants, including contacting para-legal and law schools, and professional organizations. If good faith efforts are unsuccessful, the Court or Special Master may permit the hiring of an applicant with the required graduate library science degree.

H. CONDUCT

If bathroom facilities are available, prisoners may be required to remain in the law library for a full turnout period; this may not be done for those attending solely for supplies or for notary or copy services. After being warned when possible, a prisoner may be restrained and removed from the library if he or she continues to create a threat to safety or security or to directly interfere with others' use of the library. Within 48 hours of removal, the prisoner must be provided written notice of the reasons and factual basis for this decision, with a copy held for the Special Master. A prisoner cannot adequately use the law library under restraint, including handcuffs and shackles. While in the library, non-intrusive actions, including reasonable conversations with prisoners or staff, writing, and sitting quietly, are permitted.

I. "CHECK-OUT" SYSTEM

Prisoners in minimum and medium security facilities shall be permitted direct access to the stacks when using the law library. All prisoners in a particular maximum

security institution (level 5 and above) may be denied direct access if ADOC documents vandalism or losses resulting from such access in that institution. Prisoners attending the law library shall be provided at their expense copies of limited portions of available legal materials, including cases, laws and forms, for use in the housing area; indigent prisoners shall be provided at defendants' expense any such copies required for submission to a court or agency.

If prisoners are denied direct access to the stacks ADOC must act to allow adequate research. At a minimum, upon a single check-out request for more than one book, a clerk or employee shall retrieve at least two books for the prisoner; this does not affect the practice permitting prisoner use of more than two books at a time while in the reading room.

J. NOISE LEVEL

ADOC shall take all necessary steps, and correct any structural or acoustical problems, to reduce an unacceptably high noise level in any law library. At a minimum, totally enclosed reading rooms shall not be utilized. If necessary, chain or wire material may be installed in windows separating the reading room and stack and control areas, provided that this does not interfere with the sound-flow or sight-line. Such material should not inhibit normal conversation through the window between a prisoner in the reading room and an assisting law clerk or employee, nor make it difficult to read book titles and covers of other materials.

K. PAGING SYSTEM

Individual prisoners who are not able or permitted to visit the law library must be allowed regular and timely access to necessary books and materials. This minimally requires daily exchanges between such prisoners and law library representatives of an adequate amount for re-

search purposes of requested books and materials, or copies, including cases, statutes, annotations, regulations, forms, secondary sources, and research guides. Every prisoner shall be provided a copy of the research guide required by I (F) and request forms, and be visited by a law clerk or Legal Assistant or employee with legal research experience, within 24 hours of being restricted.

L. INVENTORY

ADOC shall adequately maintain up-to-date collections in each law library of the materials and resources required by *Wilkinson v. MacDougall*, CIV 81-1397 (Jan. 5, 1984); Arizona Reporters are optional. With the approval of the Court or Special Master, defendants may use clearly equivalent publications including, but not limited to, the United States Code Service (for United States Code Annotated), Lawyers Editions (for Supreme Court Reporters), Federal Procedure Lawyers Edition (for Federal Practice and Procedure), and American Jurisprudence (for Corpus Juris).

In addition, each library shall adequately maintain (a) a full and up-to-date set of Pacific Reporters and Digests, (b) sufficient latest editions of at least three self-help or litigation manuals that assist prisoners on relevant substantive and procedural issues, (c) basic, up-to-date materials and forms in the areas of immigration practice and post-conviction remedies, and (d) a recent Arizona Bar Directory. The Special Master shall assist in identifying the specific materials, and approve these before use by ADOC.

II. THE LEGAL ASSISTANCE PROGRAM

Meaningful access to the courts requires direct assistance for prisoners who, because of language factors or lack of access to the law library, or for other reasons, are unable to perform adequate legal research and writing. In the absence of a program providing such pris-

oners with lawyers or paralegals, ADOC must maintain a sufficient number of at least minimally trained prisoner Legal Assistants at each facility, and not set institutional limits on such persons.

A. *SELECTION*

A prisoner shall become a Legal Assistant by agreeing to abide by the procedures governing Legal Assistants, and by taking the legal research course. It shall not be necessary for prisoners to take the course prior to being approved as a Legal Assistant or beginning work. Such persons must have some legal research training, experience, or ability, and, after selection, must successfully complete the full course including the live component when first available. Applicants are eligible for the full course if (a) they have a high school or GED diploma, or (b) pass a basic literacy skills test to the satisfaction of the instructor, or (c) are presently on an institutional Legal Assistant list. Absent relevant new factors, transferred Legal Assistants shall be continued in that status.

An otherwise eligible prisoner may be denied Legal Assistant status, or removed as a Legal Assistant, because of documented prison behavior indicating that he or she would create a threat to safety or security in that position; such action may not be based solely on a particular custody level or housing area, or on irrelevant infractions. A prisoner must be provided written notification of this decision, with the reasons and specific acts involved and permitted an opportunity to appeal; the notice and response shall be provided to the Special Master.

B. *NUMBER*

ADOC shall act to insure an adequate minimum number of Legal Assistants for each institution and custody level; there is no maximum. Particular steps must be taken to locate and train bilingual prisoners to be Legal Assistants. This minimally requires that schedules and

notices relating to all institutional legal services and programs be made available in Spanish and English.

C. *RETENTION*

A Legal Assistant must demonstrate at least minimal competence after one year, and thereafter upon the receipt of complaints about his or her legal work. This demonstration should be done by submitting sufficient recent legal writings and litigation materials to the legal research instructor for review, and/or by completing assigned exercises for evaluation. A determination by the instructor to remove a prisoner found not minimally competent from the Legal Assistant list must be made in writing with specific reasons and examples, and the relevant work products attached; this shall be provided to the Special Master. Such a prisoner should be reinstated upon compliance with the requirements of II (A) above.

D. *RESEARCH COURSE*

ADOC shall offer a videotaped legal research course for all prisoners, with an additional live component for prisoner law clerks and Legal Assistants, and applicants.

1. *Video Component*

The video will be 30-40 hours long with a primary focus on the fundamentals of legal research and writing, including use of the books and materials available in the law libraries. Doctrinal areas of most concern to prisoners should be covered, including 42 U.S.C. Section 1983 and other major civil rights laws; prison practices, including disciplinary and classification measures; relevant tort and civil law, including immigration and family issues, and relevant areas of criminal procedure, including appeals, collateral attacks, Habeas Corpus and time computations.

The entire video will be available for viewing by prisoners at least once in any six month period. Particular

sessions (up to six hours) shall be available for viewing at least once in any three month period for a requesting prisoner. ADOC shall develop mechanisms for the required viewing in each facility, and submit these plans to the Special Master.

The video shall be prepared by persons selected and supervised by the Special Master. It will be funded by ADOC and used in all ADOC facilities. The taped materials shall be reviewed and updated as needed, but at least once every three years.

2. *Live Component*

Shortly after viewing the taped course, prisoner law clerks and Legal Assistants, and applicants, shall be offered an additional twenty hours of live instruction. This opportunity shall be available at least once in a six month period. The instructors shall be lawyers, law students or trained paralegals with demonstrated experience and ability in teaching and evaluating legal research and writing; the proposed syllabus and schedule, and instructor's experience shall be reviewed by the Special Master for each live offering.

The live portion shall include sessions in a facility law library, with written exercises required and returned with comments. Based on a student's performance in class and on assignments, the instructor shall determine whether the prisoner is minimally competent to assist others. This determination shall be made in writing and provided to the prisoner and to the Special Master.

E. *RESPONSIBILITIES*

A Legal Assistant should not undertake or continue to assist another prisoner if, because of workload, inexperience, conflict of interest, or any other factor, he or she cannot do so in an effective and timely manner; any such factor may serve as the basis for denying a prisoner's request for assistance. On occasion, a Legal Assistant

should be prepared to respond to an institutional request to assist another prisoner or to assess the viability of a legal claim.

F. *OPERATING PROCEDURES*

1. *Selecting a Legal Assistant*

An updated complete list of Legal Assistants must be regularly available in the law library and housing areas, with all relevant instructions about the Legal Assistant Program including the selection process; this process shall not require disclosure of the requesting prisoner's legal concerns. An agreement between a prisoner seeking assistance and a Legal Assistant will be reported to and recorded in the law library. An ADOC denial because of mistake or ineligibility, or upon finding that these two prisoners cannot be together without creating a serious threat to safety or security, and the opportunity for an alternate selection, shall be provided to the prisoner and to the Legal Assistant within 72 hours of the report to the library; a copy will be held for the Special Master.

A prisoner who is unable to reach agreement with a Legal Assistant or requires a replacement, may seek institutional intervention by filing a request form in the appropriate receptacles. Upon receipt, ADOC shall act to secure the requested assistance in a timely fashion. The institution will be relieved of this responsibility in a particular matter if two Legal Assistants independently conclude after adequate review that the prisoner's claim is not viable nor capable of redress by formal legal processes; such responses shall be provided to the Special Master.

2. *Meetings*

A prisoner shall request a meeting with a Legal Assistant by use of a legal assistance form and receptacle. Legal Assistants may initiate such meetings in the same manner. Provided that other applicable requirements are

met, including access equivalent to I(C)(3), ADOC may utilize an alternative method of requesting a meeting when the sole purpose is preparation for a disciplinary hearing. ADOC must arrange a meeting that occurs within 72 hours of a request and notify the prisoner and Legal Assistant in writing of the time and place at least 24 hours prior to the meeting. An imminent legal deadline, including a pending disciplinary hearing, noted on a request requires an expedited meeting occurring within 24 hours of the request by a prisoner or Legal Assistant; II(F)(2) does not otherwise apply to assistance provided solely for a pending disciplinary matter.

ADOC must allow a prisoner to meet at least three hours each week at reasonable times and under reasonable conditions with his or her Legal Assistant; additional time shall be permitted to meet a filing or other legal deadlines. Such meetings may occur during law library turnouts; a request by a prisoner or Legal Assistant to have both persons scheduled for a particular turnout shall be given preference. If the library is not requested or available, another location allowing the necessary privacy should be utilized.

A non-contact meeting may be used by ADOC if there is a finding that this is required because of documented security problems attributable to these two prisoners, or if either is in a fully segregated status. The reasons for the non-contact shall be provided to the prisoners in the required meeting notice, and to the Special Master. Any such non-contact meeting shall permit discussion in normal tones, and allow both participants clear sight of each other and of each others legal papers.

Meetings between a prisoner and his or her Legal Assistant shall not be recorded or listened to. A prisoner shall not be given Legal Assistant status nor assigned to provide legal assistance with the objective of providing information to institutional personnel.

3. *Library Time*

ADOC shall provide Legal Assistants with additional time in the law library commensurate with their obligations to assist other prisoners. In addition to his or her own hours, a Legal Assistant shall be permitted an additional two hours of library use per week for each prisoner registered as assisting; this may be done at times when the library is not open for general use. The additional hours scheduled for a Legal Assistant may be subtracted from the weekly minimum of the prisoner being assisted.

4. *Supplies and Services*

A Legal Assistant may possess and utilize the legal supplies and services available to a prisoner he or she is registered as assisting solely for purposes relating to this assistance. If this prisoner is indigent, the Legal Assistant will be permitted those free legal supplies and services that are provided to indigent prisoners. These supplies and services must first be requested by the indigent prisoner for delivery to the Legal Assistant.

G. *OTHER PRISONER ASSISTANCE*

Nothing contained herein shall reduce a prisoner's opportunity to consult with any accessible prisoner about a legal matter, nor prohibit any prisoner, consistent with institutional requirements, from providing assistance on legal concerns, including court-related matters and institutional proceedings.

H. *OUTSIDE LEGAL CONTACTS*

Nothing herein reduces defendants' obligation to facilitate confidential and privileged contacts between prisoners and outside lawyers, authorized paralegals, legal organizations, governmental agencies and courts, through regular visits and adequate use of a telephone and mails.

I. TELEPHONE CALLS

Prisoners shall be allowed a weekly minimum of three twenty-minute calls to: (1) an attorney, (2) a designated attorney representative, or (3) a legal organization; additional calls will be permitted in an emergency. ADOC shall install a sufficient number of telephones in each facility to enable these calls during usual business hours. The calls will not be recorded or listened to, and the location of the telephones must permit private conversations.

ADOC may install systems to verify the number called and time used but, absent documented abuse, shall not deny a call to any persons in one of the above three categories nor seek any information about the call. A prisoner may choose to pay for a call or make it collect. Calls that are not completed because of technical problems, or a failure to answer or refusal to accept, do not count. Brief incoming telephone messages involving legal deadlines or other necessary information from an attorney or representative shall be timely delivered to a prisoner.

III. LEGAL SERVICES AND SUPPLIES

Meaningful access to the courts requires the availability of basic services and supplies needed for research and writing, and for the preparation and delivery of acceptable court papers.

A. NOTARY SERVICE

ADOC must provide notary service for legal papers and court-related documents within 24 hours of request by a prisoner; this period shall be less if necessary to meet a legal deadline. Absent a legal deadline, this service is not required on weekends or legal holidays. The request may be made in person during a law library turnout or by use of a legal assistance receptacle.

B. PHOTOCOPYING

ADOC must provide the necessary copies of eligible legal papers and court-related documents within 48 hours of a request by a prisoner; this period shall be less if necessary to meet a legal deadline. The request may be made in person during a law library turnout or by use of a legal assistance receptacle. ADOC may charge a reasonable rate for this service, up to five cents per page.

Eligible legal papers and documents include petitions, complaints, answers, motions, affidavits, exhibits, memoranda and briefs, including attachments and appendices, and material needed for discovery and investigation, including interrogatories and freedom of information requests. ADOC shall advise staff that prisoner legal materials are confidential and may not be read; a clearly visible sign indicating this shall be posted on or next to every copy machine used for legal materials. Each facility shall have such a machine.

C. TYPEWRITERS

Prisoners may possess typewriters and necessary accessories; storage memory is permitted but programming capacity may be denied. ADOC shall provide an adequate number of functioning typewriters in each law library for prisoner use in the preparation of legal papers. This minimally requires a one-to-five ratio of electric typewriters-to-law library capacity; such typewriters must be covered by a service contract or other professional repair system used at the facility.

D. SUPPLIES

Every facility shall have sufficient quantities of basic legal supplies regularly available for purchase by prisoners. Such supplies minimally include pens, pencils, legal pads, typing paper, typewriter ribbons, ko-rec-type or equivalent, file folders, regular size and manila envelopes, postage and

brief covers and binders. A reasonable price may be charged for these items, within the departmental guidelines of a ten percent above cost maximum mark-up. The prices of all items, legal or otherwise, available for purchase must be publicized prior to ordering by prisoners. Subject to usual security and search procedures, prisoners may receive any basic legal supplies, books, and materials by delivery or mail from outside persons, organizations or businesses.

IV. INDIGENT PRISONERS

A. ELIGIBILITY

Subject to the requirements contained herein, a prisoner shall be provided basic legal supplies and services at ADOC expense if: (a) he or she has less than \$46.00 in the prison account on the date of the request, and (b) there has been less than \$46.00 in total deposits to this account in the 28-day period ending on the date of the request. A prisoner who meets (a) but not (b) shall be provided those specific supplies and services required to meet an imminent and documented legal deadline, and a written statement of the costs of these. If this occurs, ADOC may, with written notice to the prisoner, debit the prisoner's account whenever and to the extent that the balance exceeds \$46.00 until the cost of the emergency item is repaid.

ADOC shall regularly adjust the above cut-off figure in order to adequately insure a prisoner's access to basic legal supplies and services without sacrificing basic hygiene needs. This adjustment shall occur at least every 24 months beginning the date of the entry of this Order. It shall minimally be the percent change in the U.S. Consumer Price Index for the previous 24 months multiplied by the existing cut-off figure. The resulting new cut-off figure shall be rounded to the nearest fifty-cents.

B. SUPPLIES AND SERVICES

1. Supplies

Upon request, the following supplies shall be provided to eligible prisoners; the numbers in parentheses indicate the minimum amount of the item that must be provided for one week: pens (1), pencils (1), typing paper (10 sheets), legal pad (1), file folders (1) and regular envelopes (4). Brief covers and bindings, manila envelopes, and additional amounts of the above supplies shall be provided if necessary to meet a court deadline or requirement. Upon request, an eligible prisoner possessing a typewriter shall also be provided one suitable typewriter ribbon and one ko-rec-type or equivalent each week.

ADOC may require that the requesting prisoner check the specific items needed for legal research or preparation of legal papers during the next week. Pursuant to Section II (F)(4), the prisoner should indicate which, if any, of the supplies should be delivered directly to his or her Legal Assistant.

2. Postage

Postage shall be provided for all legal mail for eligible prisoners. Legal mail includes letters and documents sent to a court, to an attorney, to a legal agency or organization, or to a pro se opposing party.

C. PHOTOCOPYING

Eligible prisoners shall be provided the necessary copies of legal papers and court related documents as described in Section III (B). A prisoner shall minimally be provided with the number of copies of a document required by the Court, plus one copy for the opposing party and one for his or her records.

D. REQUEST PROCEDURE

The request procedures and forms shall comply with the applicable requirements of Section I (C). The request may be delivered in person during a law library turnout

or placed in the appropriate receptacle. The prisoner should indicate that to his or her knowledge the eligibility requirements are met and which supplies and services are required.

E. *RESPONSE PROCEDURE*

Law library staff or clerks shall collect the prisoner request forms from each deposit point at least once each day. ADOC shall deliver the requested supplies or services to an eligible prisoner or designated Legal Assistant within 48 hours of the request; this period shall be less if necessary to meet a legal deadline. A prisoner shall be provided written notification of a denial of all or part of his or her request, with the specific reasons, within 48 hours of the request; a copy will be held for the Special Master. The 48 hour periods do not include weekends or legal holidays.

V. *IMPLEMENTATION*

A. *NOTICE*

Plaintiffs may transmit this Order and Commentary to members of the plaintiff class by mail or bulk delivery of copies to the ADOC and may provide ADOC with additional copies that will be kept on reserve in each law library and made available to prisoners during library turnouts. Plaintiffs or the Special Master may provide ADOC with a summary of this Order which shall be made regularly available in the law library and housing areas.

B. *SPECIAL MASTER*

All orders concerning the powers, payment and responsibilities of the Special Master, Professor Daniel J. Pochoda, are herein incorporated. Above references to the Special Master include his authorized representatives and Assistant Special Master Janet Bliss.

COMMENTARY

I. *THE LAW LIBRARIES*

Defendants' proposal that existing institutions without law libraries should not be required to build them is reasonable; the significant costs involved are not justified by need. Although not requested, the Proposed Order ("PO") allows ADOC to operate facilities without law libraries if the population is less than 150. Prisoners in the above prisons must get all of the required opportunities (10 hours per week in a law library, timely copies and supplies, legal assistance, etc.). Pending implementation and additional facts, specific size and seating requirements or ratios have not been included. Defendants agreed to address the clearly inadequate library at Santa Rita, ASPC—Tucson (minimum 22 capacity required).

A. & B. *ACCESS & SCHEDULE*

The PO adopts Defendants' proposal to reduce the total number of weekly library hours in facilities that do not require advance scheduling for turnouts. Thus, such facilities are only required to maintain a 50 hour per week schedule, as compared to the minimum 84 hours per week at Central Unit; the 50 hours are needed to meet the goal and mandates of the PO.

The PO includes some evening and weekend hours as done now in several facilities (e.g., Gila, Mohave at Douglas). These periods are necessary since most jobs keep prisoners occupied during weekdays (until 3:00 p.m., with dinner at 4:00 p.m.).

The PO also reduces the total time requirements in most facilities that, as Central Unit, require advance scheduling. This was done on the initiative of the Special Master based on an assessment of lesser-capacity institutions (Central Unit housed more than 800).

In every facility—absent emergencies—the library must be actually open and available for prisoner use during the “scheduled” hours. Such use cannot depend on the availability of a particular employee or prisoner clerk (any more than scheduled meals or visiting hours are).

As agreed when formulating the *Gluth* remedy, law library use cannot subject prisoners to unnecessarily onerous or retaliatory practices, including intrusive searches of all visitors or clerks and disciplinary write-ups for any failures to attend; These are occurring in some facilities. Such practices are not used at the maximum securing Central Unit or in most facilities. They are generally not required for other congregate activities (classes, jobs, meals, etc.). Unexpected events or suspected threats may require strip searches, and disciplinary action may be necessary if schedules are regularly ignored without explanation. At the Central Unit, reasonable explanations for missed turnouts include scheduling conflict, miscommunication, illness and employee error.

The PO adopts Defendants’ proposal to except the SMU—and on the Special Master’s initiative other facilities—from the *Gluth* turnout minimums. This is subject to receiving the actual schedules in each prison and determining their adequacies for all custody levels and housing areas.

C. ADVANCE RESPONSE PROCEDURE

The PO adopts Defendants’ proposal to only mandate computers in libraries requiring advanced scheduling.

G. LIBRARIAN

This mandate remains the same as *Gluth* with a “preference” for applicants with a law or paralegal degree. This is necessitated by Defendants’ failure to hire any such persons, despite their recognized value. In fact, in its April 1991 Order, the Court specifically noted the need

for such expertise and that such persons would reduce total costs to Defendants by their ability to teach the required research courses and to monitor the work of Legal Assistants.

I. “CHECK-OUT” SYSTEM

As was the case in *Gluth*, the PO permits use of a “check-out” system in maximum security facilities. It adopts Defendants’ more practical position that this system can—with the necessary showing—be instituted prison-wide, and not only on the person-by-person basis proposed by Plaintiffs. At this time, a check-out system may be used at the Central Unit, CB6 and Special Management Unit facilities.

Direct access to the stacks is required in lesser-security prisons, although reasonable measures may be taken (e.g., limit the numbers in the stacks, assign a clerk to observe and assist). Direct access facilitates adequate research and, given the limited experience of most prisoners, may on occasion be a significant factor. The primary cause of vandalism is addressed by allowing copies of portions of the books and materials available in the library, including cases, laws and forms, for use in the housing area (at the prisoners’ expense).

L. INVENTORY

This addition is required by the Court’s September 13, 1992 Findings and Conclusions; it closely follows these Findings and Plaintiffs’ proposal. Additional costs attributable to Pacific Reporters are offset by making the Arizona Reporters optional and generally by allowing clearly equivalent (competing) publications.

II. THE LEGAL ASSISTANCE PROGRAM

D. RESEARCH COURSE

This is an effort to reduce the obligations on and costs to Defendants while still providing the previously adjudicated 60-hour course (at least for law clerks and Legal

Assistants). Thus, the PO provides that most of the 60 hours will consist of video taped sessions and that the great majority of prisoners would be limited to these sessions. While there would necessarily be dollar-costs required to prepare this lengthy and difficult tape, it is primarily a one-time expenditure and represents significant savings from the twice-a-year, 60 hour live *Gluth* model.

An effective course for clerks and Assistants requires a live component, including hands-on training in a law library and feedback on written exercises. This component is greatly reduced (to 20 hours) and should allow for Complex-wide offerings. As noted, use of full-time librarians *with* law or paralegal degrees would result in little additional or ongoing costs because of this requirement. ADOC should require that other librarians and library staff take the full course.

F. 1. *SELECTING A LEGAL ASSISTANT*

The PO incorporates Defendants' proposal that Legal Assistant requests may be denied based on a finding about a security problem.

2. *MEETINGS*

The PO incorporates Defendants' request that contact visits may be denied because of security problems. As with library visits, unsupported blanket denials are not permitted (e.g., for an entire facility). There was no showing of necessity in all the prisons listed, and contact visits are used at the maximum security Central Unit. There was no explanation of why prisoners can have "contact" for some purposes, but not others (prisoners whose actions/status require complete separation meet the specific showing required by the PO). Courts have recognized that proper—and legal—remedial provisions are often not themselves "constitutional rights".

I. *TELEPHONE CALLS*

This is required by the Court's Findings and Conclusions. The specifics follow these Findings and Defendants' proposal, with a three call minimum (versus two).

III. *LEGAL SERVICES AND SUPPLIES*

A. *NOTARY SERVICE*

The Defendants' request regarding weekends and holidays is incorporated.

B. *PHOTOCOPYING*

The sign is required by the Court's Findings.

IV. *INDIGENT PRISONERS*

E. *RESPONSE PROCEDURE*

The PO adopts Defendants' proposal to include legal holidays.

DATED this 8 day of October, 1993.

/s/ C.A. Muecke
C.A. MUECKE
U.S. District Judge

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APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-851

SAMUEL A. LEWIS, *et al.*,
Petitioners,
v.

FLETCHER CASEY, JR., *et al.*

May 2, 1994

The application for stay of the enforcement of the injunctive order of the United States District Court for the District of Arizona, case Nos. 90-0054 and 91-1808, issued October 13, 1993, presented to Justice O'CONNOR and by her referred to the Court is granted pending the timely filing and disposition by this Court of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

Justice BLACKMUN, Justice STEVENS, Justice SOUTER and Justice GINSBURG would deny the application for a stay.

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APPENDIX E

[Filed Nov. 25, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 90-0054 PHX CAM
No. CIV 91-1808 PHX CAM
(consolidated)

FLETCHER CASEY, *et al.*,
Plaintiffs,
vs.
SAMUEL A. LEWIS, *et al.*,
Defendants.

ORDER

On November 13, 1992, the Court issued Findings of Fact and Conclusions of Law finding liability with respect to the access to the courts issues in this case. The only issue that remains regarding access to the courts is the scope of the injunctive relief. Appointment of a Special Master to investigate and report about how best to accomplish the goal of constitutionally adequate inmate access to the courts will provide this Court with the proper injunctive relief necessary to enter a final judgment.

IT IS THEREFORE ORDERED THAT:

(1) Daniel J. Pochoda is appointed Special Master in this case pursuant to Rule 53, Fed. R. Civ. P. Professor Pochoda shall also serve as an expert¹ qualified to exam-

¹ As an expert, the Special Master's testimony in court hearings, as well as his written report, shall become part of the record as direct evidence, subject to cross examination.

ine the conditions at the Arizona State Prisons relevant to the access to the courts issues. Janet Bliss shall serve as Assistant Special Master.

Daniel Pochoda and Janet Bliss have been acting in the capacities of Special Master and Assistant Special Master in *Gluth v. Kangas*, CIV 84-1626 PHX CAM. Many of the issues in this case have been resolved for the Central Unit in Florence by the Special Master and his assistant in the *Gluth* case. In addition, the Ninth Circuit has affirmed the resolution of those issues. The Special Master/Expert and his Assistant Special Master shall work with the parties and develop the proper injunctive relief. For those issues that have been resolved successfully in *Gluth*, the Court intends to implement the *Gluth* policies statewide, with any modifications that the parties and Special Master² determine are necessary due to the particular circumstances of the prison facility. For the remaining issues not addressed in *Gluth*, the Special Master and his assistant will work with the parties to develop the proper injunctive relief for plaintiffs.

(2) *The Special Master shall have the following Responsibilities:*

- (a) The Special Master shall formulate the injunctive relief necessary to remedy the constitutional violations relevant to the access to the courts issues in this case and monitor the implementation of that injunctive relief.
- (b) For those issues resolved in *Gluth*, the Special Master shall implement the injunctive relief set forth in *Gluth v. Kangas*, [Exhibit A], with modifications deemed appropriate because of the particular circumstances of the facility. Exhibit A, a compilation of the orders in *Gluth*, sets

² Unless otherwise noted, use of the word Special Master in this order refers to both the Special Master and his Assistant.

forth the specific injunctive relief ordered in that case.

No later than January 22, 1993, the parties shall file written objections, if any, setting forth their objections to implementation of the *Gluth* injunction in particular facilities. The objections shall set forth the particular provisions of the injunction to which they object; propose modifications to the injunction and set forth the particular circumstances that require modification of the injunction. The particular needs or circumstances must be documented and supported by evidence.

- (c) For those issues not resolved in *Gluth*, the Special Master shall meet with the parties, obtain their input on the form of injunctive relief, and propose the final injunctive relief.
- (d) In formulating his proposals for a permanent injunction, as provided for in the preceding paragraph, the Special Master, in addition to his own inquiry, shall:
 - (1) Meet with inmates, appropriate Arizona Department of Corrections personnel and counsel to make whatever reasonable inquiry necessary to evaluate conditions and policies to determine effective ways to insure adequate access to the courts.
 - (2) Report his conclusions to the parties and this Court at such time as will be fixed by the Court after consultation with the Special Master and the parties. The Special Master will be available to provide testimony about his final report at a hearing to be scheduled by the Court to enable the parties and the Court to cross-examine the Special Master for the record and to assist

- the Court in determining the language and content of the permanent injunction.
- (3) Have all powers necessary to carry out these functions including but not limited to the power to compel attendance of the parties at negotiating sessions, and to have access to documents and necessary ADOC personnel and inmates.
 - (4) File his report(s) with the Clerk of the Court and shall file any proceedings that are transcribed, and the original exhibits, and any other evidence. The Clerk shall immediately mail notice of the filing to all parties.
 - (5) When a party so requests, make a record of the evidence offered and excluded at any hearing conducted by the Special Master.
 - (6) Proceed with all reasonable diligence in conducting hearings and investigations necessary for compliance with the Court's order.
- (e) The Special Master shall file periodic written reports to the Court and shall file a final written report of his findings, conclusions, and recommendations no later than July 1, 1993.
- (1) The Special Master shall include in his final report to the Court and the parties, the language he proposes that the Court should use in the form of a permanent injunction to keep in place for the future, i.e., such procedures as needed to provide for and allow continued access to the courts by the class members.
 - (2) The Court will subsequently conduct hearings that it deems necessary to determine the language of the final injunction.

- (3) The parties involved may procure the attendance of witnesses before the Special Master by the issuance and service of subpoenas, and may offer testimony and witnesses in support or opposition, and may cross-examine opposing witnesses. This does not preclude any party from objecting to the subpoena and raising any legitimate defenses subject to the ruling of the Special Master.
- (4) Within ten days after being served with notice of the filing of the Special Master's report, any party may serve written objects thereto upon the other parties and the Court. The Court may accept, or may modify or reject the report after examination of the report and the objections, or may receive further evidence.
- (5) The special master will be available to provide testimony about his findings, conclusions, and recommendations at hearings scheduled at the request of the parties, special master, or Court to determine the parameters of the final order.
- (6) The special master shall have all powers necessary to carry out these functions including access to underlying documents, prison records, and other information, cooperation from ADOC personnel, and contact with prisoners.
- (7) The Court will describe any continuing duties of the special masters when it issues its final judgment. However, the special master may also make recommendations as to what these continuing duties should entail.

- (8) All costs and expenses, including a reasonable compensation for the responsibilities of performing the duties of special master shall be covered by defendants.

(3) *The Special Master shall have the following Powers:*

- (a) The Special Master shall have direct inmate access. ADOC shall inform inmates of the right to access to the Special Master. ADOC shall not interfere with inmate attempts to contact the Special Master or with any letters to or from the Special Master, and shall provide a place for the Special Master to meet with inmates.
- (b) The Special Master has and shall exercise the power to regulate all proceedings and every hearing before the Special Master, and to do all acts and take all measures necessary or proper for the efficient performance of the Special Master's duties.
- (c) The Special Master may require the production before the Special Master of evidence upon all matters embraced in the court order, including books, vouchers, documents, and other writings applicable thereto.
- (d) The Special Master has the authority to put witnesses under oath, and may examine them, and may summon the parties to appear at a hearing either to be examined under oath or for the purpose of conducting witness examinations.
- (e) If a summoned party fails to appear for hearing at the time and place appointed, the Special Master may proceed ex parte or, in the Special Master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

- (f) The Special Master may request the Court for an Order to Show Cause hearing directed to any person failing to appear at a hearing or failing to provide materials requested in response to a summons.

- (g) Any powers not included in this section but provided for elsewhere in this order shall be considered part of this section. Such powers shall also be incorporated by reference in all other sections of this order.

(4) *The Special Master shall be compensated in the following manner:*

- (a) The Special Master shall be paid \$120 per hour.³ The Assistant Special Master shall be paid \$65 per hour.
- (b) No later than the First day of each month, the Special Master and Assistant Special Master shall each submit an itemized statement of their fees for the previous month to defendants' counsel. The Special Master and Assistant Special Master will be compensated by the defendants for their fees within fourteen (14) days of receipt of the Special Master's monthly invoice. Such compensation will continue until the Special Master's duties are fulfilled according to the Court's order.
- (c) No later than December 4, 1992, Defendants' counsel, the Special Master and Assistant Special Master shall open and maintain a bank account to be utilized solely for reasonable expenses and costs necessary for performing the duties of Special Master. These costs include: necessary travel costs, expense for preparation

³ This is the same hourly rate the Special Master was paid in the *Gluth* case.

and production of written drafts and final reports, secretarial and clerical costs, and expenses incurred through conducting and transcribing necessary hearings. The defendants shall deposit at least \$5,000 in the account. The Special Master and Assistant Special Master shall have the authority to withdraw funds from the account to be used as expenses in this case. On the first day of each month, the Special Master shall notify defense counsel of the amount presently in the account. No later than the tenth day of each month, the defendants shall deposit funds into the account to replace those funds used in the previous month. No later than the tenth day of each month, the Special Master shall provide the defendants with a written, itemized statement, with necessary receipts, of all costs and expenses withdrawn from the account in the preceding month. Defendants may object to specific expenses in writing to the Special Master within 20 days of the written notice from the Special Master.

- (d) If there is an objection to particular itemized expenses, payment will not be deferred by the reasonableness of the expenses but will be brought before this Court for determination.
- (e) Within thirty (30) days after completing and submitting the final report, the special master shall submit to the Court a final bill of costs, expenses and compensation. If the defendants object to the payment of any of the expenses or costs, they shall file those objections within thirty (30) days of receipt of the final bill. The Court will examine that bill to determine if it is fair and reasonable under the circumstances.

(5) *The Special Master shall have the following duties after entry of the permanent injunction:*

The Special Master will conduct three evaluations of conditions of the Arizona State Prison Complex facilities relating to the Court's final order, at six month intervals following the entry of the order and shall file a report of his findings with the Clerk of the Court. He shall have any of the previously enumerated powers to facilitate his preparation of these reports.

(6) *Settlement:* Nothing contained in this order shall suggest that a settlement between the parties in this case would not be considered by the Court. To this end, the Special Master shall provide such guidance and counsel as either of the parties may request to effect such a settlement.

(7) *Notice:* Defendants shall post notices in every facility, in locations permitting daily visibility for prisoners in that facility, including in each library. The notices shall state that the Court has appointed a Special Master to formulate and monitor the relief involving the access to the courts issues, and that the Special Master or his Assistant will be visiting the facilities to talk to staff or prisoners. The notices will state that the Special Master is not a substitute for the regular grievance and disciplinary procedures for either prisoners or staff members. The Notice shall also inform prisoners that a copy of the Findings of Fact and Conclusions of Law and copies of orders in this case will be available for inspection by prisoners and staff at each facility law library.

Dated this 20 day of November, 1992.

/s/ C.A. Muecke
C.A. MUECKE
United States District Judge

Arizona Department of Corrections (ADOC) shall provide meaningful access to the courts for all Central Unit prisoners. The practices and procedures set out below will achieve this constitutional mandate. They concern those areas raised by or necessarily implicated in this litigation and incorporate approaches utilized by Central Unit administrators.

I. THE LAW LIBRARY

ADOC shall maintain an adequate law library and provide sufficient access and assistance to enable prisoners to engage in the basic legal research required for meaningful access to the courts.

A. Access

Central unit prisoners in all housing areas and custody levels shall be provided regular and comparable visits to the law library. This opportunity may be postponed on an individual basis because of the prisoner's documented inability to use the law library without creating a threat to safety or security, or his physical condition if determined by medical personnel to prevent library use. Upon request, a Central Unit prisoner will be permitted a minimum of ten hours of actual law library use each week; additional time shall be allowed if necessary to meet a filing or other legal deadline.

B. Schedule

The law library shall be open for prisoner use at least twelve hours each day between the hours of 7 a.m. and 10 p.m. A minimum of four turnouts will be scheduled each day. Each turnout must provide prisoners a minimum of two hours of actual library use. Every prisoner should sign the log-book at the law library to indicate the time of arrival and departure from the library for that turnout; copies of the relevant log-book pages shall be maintained for the Special Master.

Upon arrival at the law library, a prisoner may choose to sit in either reading room for that turnout, provided that the rooms are not reserved for different custody levels or runs, and no other documented security considerations exist. This choice is subject to the need to maintain comparable numbers in each room, although a prisoner shall be allowed to sit with any prisoner providing legal help and scheduled for that turnout, even if not a "Legal Assistant."

C. Request Procedure

Prisoners shall be responsible for selecting their law library turnouts and reducing conflicts with other institutional activities, and for depositing their requests and copies directly in the appropriate receptacles; this requires that ADOC provide timely and adequate information, forms, and access to receptacles, as set out below.

The first library turnout requested by a prisoner must be at least three days after the day the form is deposited; this may be one day if necessary to meet a legal deadline. The week referred to in I(A) begins the day of the first scheduled turnout, and at least ten hours of library use shall be permitted during this seven-day period.

Defendants shall provide adequate notification of the above procedures and timetables, including posting in each cell-block. The Special Master, in consultation with plaintiffs and defendants, shall analyze the turnout schedule, focusing on those periods regularly revealing below-average attendance, and ascertain whether any alterations should be made to increase the library availability for one custody level without reducing the opportunities for another.

1. Information

At least one week prior to the end of each month ADOC shall make known to all prisoners (a) the law library schedule of hours and turnouts for the next month,

and (b) the specific schedule of important activities at the Central Unit for the next month, including outside visiting hours, formal classes, religious services, and field turnouts for each housing area; this is not required for those items whose schedule (days and hours) remains the same in the upcoming month.

2. *Forms*

ADOC shall develop law library turnout and legal assistance request forms and have them regularly available in the housing areas and law library for distribution to prisoners. The law library form should minimally include space for the date submitted and for the selection of specific library turnouts and alternates for up to two weeks, and to detail any filing or other legal deadline. Any such deadline should be verified by relevant documentation identified and possessed by the prisoner or included with the request, or by a description of this information and explanation of why it is not available.

3. *Receptacles*

ADOC shall maintain secure, tamper-resistant receptacles for law library and other legal assistance requests from prisoners. These receptacles must be accessible to prisoners in all housing areas and custody levels at the Central Unit on a daily basis; this minimally requires placement of such a receptacle at both doors to the main dining area. ADOC should develop a method of direct, daily placement in appropriate receptacles of requests from individual prisoners who are unable to use this dining area; this may require additional receptacles.

ADOC shall maintain secure, tamper-resistant, and accessible receptacles for the deposit of prisoner communications or complaints to the Special Master. The Special Master will have regular access to these receptacles and sole responsibility for collection.

D. *Response Procedure*

Law Library staff or clerks shall collect the original prisoner law library and other legal assistance forms from each deposit point at least once every day. ADOC must develop procedures for scheduling law library turnouts that provide adequate notice and access for all eligible prisoners with preference for those with filing or other legal deadlines, and that insure compliance with this Order. This minimally requires that the CU law library be equipped with a computer that is regularly and primarily used for this purpose.

Denial of a particular turnout may be based on a lack of available library space for that period, or on a finding that the requesting prisoner and a prisoner previously scheduled for that period cannot be together in the library without creating a serious threat to safety or security. If a denial occurs, the prisoner shall be given preference on his remaining requests or a timely opportunity to make additional requests if necessary to meet the weekly ten-hour minimum requirement.

A prisoner shall be provided written notification of his scheduled law library turnouts and of any denied with the reason and factual basis for the denial, and given the opportunity to make additional requests if necessary. This notice must reach the prisoner at least 24-hours before the time of his first requested turnout whether this was granted or denied. Copies of the names or number of prisoners scheduled for each turnout, and of the number of percent of those who attended, will be kept at the law library for collection by the Special Master.

E. *Law Clerks*

ADOC shall provide a sufficient number of law library prisoner law clerks to permit adequate assistance for prisoners using the library and for those ineligible for such use, including Spanish-speaking prisoners in both cate-

gories. This assistance includes providing elementary information about the content and purpose of the books and materials in the library, and about researching specified issues and locating relevant decisions, statutes, regulations and forms. In order to adequately perform this basic function, law clerks must successfully complete the legal research course, described in II(D) below, either prior to beginning work, or the first time it is available. In contrast to Legal Assistants, law clerks shall provide guidance to all eligible prisoners, although such guidance is limited in scope and does not extend to the preparation of legal documents for others.

As long as the inmate population at the Central Unit remains at its current level, there shall be a minimum of 14 law-library clerks employed at the CU. For each turnout, at least two law clerks per reading room shall be assigned to provide the court-ordered research assistance in the room and book retrieval for that room. To achieve this, prisoners with research experience and ability shall be solicited and favored for the law clerk positions by the relevant CU committees and administrators. Defendants shall implement a viable method to provide law clerk assistance for PC prisoners attending the law library.

F. *Research Guide*

Plaintiffs will prepare an introductory guide to the use of the law library, with brief explanations of the contents and use of the available resources and elementary research assistance on the most common legal issues. Defendants will review the proposed introductory guide and have an opportunity to make comments and/or suggest revisions. After approval by the Special Master, this guide shall be printed by defendants, and made available to all requesting prisoners while attending the law library.

G. *Librarian*

ADOC shall provide at least one full-time professionally trained librarian and adequate secretarial support for the librarian and law library. Subject to identified security needs, the librarian will be responsible for the policies and procedures in the law library and for insuring adequate access to the courts for CU prisoners. The librarian shall possess a library science degree, law degree, or paralegal degree. The librarian shall be paid a salary equal to that of other ADOC law librarians with additional amounts or incentives if necessitated by conditions at CU. The Special Master will work with ADOC on securing applicants, including contacting schools and professional organizations. The Court will consider modification of this requirement if, despite good faith efforts, a qualified candidate has not accepted this position after two fiscal years.

H. *Conduct*

ADOC may require prisoners to remain in the law library for the full turnout period. After being warned when possible, a prisoner may be involuntarily removed from the library if he continues to create a threat to safety or security, or to directly interfere with others' use of the library. Within 48 hours of removal, the prisoner must be provided written notice of the reasons and factual basis for this decision, with a copy held for the Special Master. Non-intrusive actions, including reasonable conversations with prisoners of staff, writing, and sitting quietly, are permitted.

I. *"Check-Out" System*

If prisoners are denied direct access to the stacks because of documented problems attributable to this access, ADOC must act to allow adequate research. At a minimum, upon a single check-out request for more than one book, a law library clerk shall retrieve at least two books

for the prisoner; this does not affect the practice permitting prisoner use of more than two books at a time while in the reading room.

J. *Noise Level*

The level of noise in the enclosed reading rooms has often been unacceptably high and ADOC must correct this problem. At a minimum, the glass in the windows separating the reading rooms and the stack area shall be removed. Chain or wire material may be installed provided that this does not interfere with the sound-flow or sight-line; such material should not inhibit normal conversation through the window between a prisoner in the reading room and assisting law clerk in the stack area, nor make it difficult to read book titles and covers of other materials.

K. *Paging System*

Individual prisoners who are not able or permitted to visit the law library must be allowed regular and timely access to necessary books and materials. This minimally requires daily exchanges between such prisoners and law library representatives of an adequate amount for research purposes of requested books and materials, or copies, including cases, statutes, annotations, regulations, forms, secondary sources, and research guides.

II. *THE LEGAL ASSISTANCE PROGRAM*

Meaningful access to the courts requires direct assistance for prisoners who, because of language factors or lack of access to the law library, or for other reasons, are unable to perform adequate legal research and writing. In the absence of a program providing such prisoners with lawyers or paralegals, ADOC must maintain a sufficient number of at least minimally trained prisoner Legal Assistants.

A. *Selection*

A prisoner shall become a Legal Assistant by agreeing to abide by the procedures governing Legal Assistants, and by taking the legal research course. It shall not be necessary for prisoners to take the course prior to being approved as a Legal Assistant or beginning work. Such persons must have some legal research training, experience, or ability, and, after selection, must successfully complete the course when first available; these persons shall be given preference for the course. Prisoners are eligible for the legal research course if (a) they have a High-School or GED diploma, or (b) pass a basic literacy skills test to the satisfaction of the instructor, or (c) are presently on the Central Unit Legal Assistant list.

An otherwise eligible prisoner may be denied Legal Assistance status by the Deputy Warden or designee because of documented prison behavior indicating that he would create a threat to safety or security in that position; such rejection may not be based solely on a particular custody level or housing area. A prisoner must be provided written notification of a rejection, with the reasons and specific acts involved, and permitted an opportunity to appeal this determination; the notice and response shall be provided to the Special Master.

B. *Number*

ADOC shall act to insure an adequate minimum number of Legal Assistants for each custody level; there is no maximum. Particular steps must be taken to locate and train bilingual prisoners. This minimally requires that schedules and notices relating to Central Unit legal services and programs be made available in Spanish and English.

C. *Retention*

A Legal Assistant must demonstrate at least minimal competence after one year, and thereafter upon the receipt of complaints about his legal work. This may be

done by submitting sufficient recent legal writings, including pleadings and memoranda, to the legal research instructor for review. If necessary, the instructor may require that the Legal Assistant complete an exercise or examination from the legal research course for evaluation. A determination by the instructor to remove a prisoner found not minimally competent from the Legal Assistant list must be made in writing with specific reasons and examples, and the relevant work products attached; this shall be provided to the Special Master. Such a prisoner should be reinstated upon compliance with the requirements of II(A) above.

D. *Research Course*

ADOC shall offer a legal research and writing course for Central Unit prisoners. The Special Master will work directly with persons designated by the ADOC on the development and implementation of this course and report the details to the Court.

In developing the course, the following elements are required:

(a) a minimum of sixty (60) hours of instruction provided in a ten-to-twelve week period, with two such courses given each year;

(b) a lawyer, law student or otherwise trained paralegal instructor with demonstrated experience and ability in teaching and evaluating legal research and writing;

(c) a hands-on approach to the needs of Central Unit prisoners, including some sessions in the law library and the rest in a classroom allowing for immediate teacher-student interaction;

(d) all sessions videotaped for restricted-movement prisoners. This requirement will be waived until 1995 because of the existence of a recently taped course. Defendants shall maintain and make available the course tapes as required;

(e) a primary focus on the fundamentals of research and writing, including use of basic reference books and materials, with regular written exercises required and returned with comments during the course;

(f) some doctrinal coverage of 42 U.S.C. Section 1983 and other major civil rights statutes, of prison practices including disciplinary and classification measures, of relevant tort law and relevant areas of criminal procedure including appeals, collateral attacks and Habeas Corpus;

(g) all Central Unit prisoners are eligible, with classroom preference given to qualifying Legal Assistant and law clerk applicants, and

(h) a final evaluation based on a student's performance in class and on assignments and examinations, taking into account improvement during the course, as to whether the prisoner is minimally competent to assist others with their legal problems; this certification is not required for those taking the course for other reasons.

E. *Responsibilities*

A Legal Assistant should not undertake or continue to assist another prisoner if, because of workload, inexperience, conflict of interest, or any other factor, he cannot do so in an effective and timely manner; and such factor may serve as the basis for denying a prisoner's request for assistance. On occasion, a Legal Assistant should be prepared to respond to an institutional request to assist another prisoner or to assess the viability of a legal claim.

Absent the prisoner's permission, a Legal Assistant should not disclose information about the underlying situation or legal plans of a prisoner being assisted. If this is done under the limited circumstance of II(F)(5) below, the resulting conflict of interest minimally requires a reassessment of the relationship with the prisoner being assisted.

F. *Operating Procedures*

1. *Selecting a Legal Assistant*

An updated complete list of Legal Assistants must be regularly available in the law library and housing areas, with all relevant instructions about the Legal Assistant Program, including the selection process. An agreement between a prisoner seeking assistance and a Legal Assistant will be registered in the law library after placement of the appropriate form and copy by this prisoner in legal assistance receptacles. Written notification of the registry, or of a denial because of mistake or ineligibility and the opportunity for an alternate selection, shall be provided to the prisoner and to the Legal Assistant within 48 hours of this placement, with a copy held for the Special Master.

A prisoner who is unable to reach agreement with a Legal Assistant, or requires a replacement, may seek institutional intervention by filing a request form and copy in the appropriate receptacles. Upon receipt, law library staff and the Deputy Warden shall act to secure the requested assistance in a timely fashion. The institution will be relieved of this responsibility in a particular matter if two Legal Assistants independently conclude after adequate review that the prisoner's claim is not viable nor capable of redress by formal legal processes; such responses shall be provided to the Special Master.

2. *Meetings*

A Central Unit prisoner shall request a meeting with his Legal Assistant by use of a legal assistance form and receptacle. Legal Assistants may initiate such meetings in the same manner. Provided that other applicable requirements are met, including access equivalent to I(C) (3), ADOC may utilize an alternative method of requesting a meeting when the sole purpose is preparation for a disciplinary hearing. ADOC must arrange a meeting that

occurs within 72 hours of a request, and notify the prisoner and Legal Assistant in writing of the time and place at least 24 hours prior to the meeting. An imminent legal deadline, including a pending disciplinary hearing, noted on a request requires an expedited meeting occurring within 24 hours of the request by a prisoner or Legal Assistant; II(F)(2) does not otherwise apply to assistance provided solely for a pending disciplinary matter.

ADOC must allow a prisoner to meet at least three hours each week with his Legal Assistant; additional time shall be permitted to meet a filing or other legal deadline. Such meetings may occur during law library turnouts; a request by a prisoner or Legal Assistant to have both persons scheduled for a particular turnout shall be given preference. If the library is not requested or available, another location allowing the necessary privacy should be utilized.

3. *Library Time*

ADOC shall provide Legal Assistants with additional time in the law library commensurate with their obligations to assist other prisoners. In addition to his own hours required by I(A) and (B), above, a Legal Assistant should be allotted two additional turnouts per week, each providing a minimum of two hours of actual library use, for each prisoner that he is registered as assisting. Any such additional turnouts scheduled for a Legal Assistant shall be subtracted from the weekly minimum of the prisoner being assisted. If necessitated by lack of available library space, ADOC may limit such additional turnouts to five in a particular week.

4. *Supplies and Services*

A Legal Assistant may possess and utilize the legal supplies and services available to a prisoner he is registered as assisting solely for purposes relating to this assistance. If this prisoner is indigent, the Legal Assistant will be

permitted those free legal supplies and services that are provided to indigent prisoners. These supplies and services must first be requested by the indigent prisoner for delivery to either the Legal Assistant or himself.

5. *Disclosure*

The attorney-client privilege does not attach to the prisoner-Legal Assistant relationship; if prompted by a serious concern of institutional safety or security ADOC may ask a Legal Assistant to reveal information derived from this relationship. Such a request should be limited in scope to this concern and not seek more information than necessary, and shall result in permitting the prisoner to change Legal Assistants in order to be adequately represented and in notice to the Special Master.

Meetings and discussions between a prisoner and his Legal Assistant should not be subjected to intentional or extended eavesdropping. A prisoner shall not be given Legal Assistant status nor assigned to a particular legal assistance matter with the objective of providing information to institutional personnel.

G. *Other Prisoner Assistance*

Nothing contained herein shall reduce a prisoner's opportunity to consult with any prisoner accessible to him in the Central Unit about a legal matter, nor prohibit any prisoner, consistent with institutional requirements, from providing assistance on legal concerns including court-related matters and institutional proceedings.

H. *Outside Legal Contacts*

Nothing herein reduces defendants' obligation to facilitate confidential and privileged contacts between Central Unit prisoners and outside lawyers, authorized paralegals, legal organizations, governmental agencies and courts, through regular visits and adequate use of telephones and mails.

III. *LEGAL SERVICES AND SUPPLIES*

Meaningful access to the courts requires the availability of basic services and supplies needed for research and writing, and for the preparation and delivery of acceptable court papers.

A. *Notary Service*

ADOC must provide notary service for legal papers and court-related documents within 24 hours of a request by a Central Unit prisoner; this period shall be less if necessary to meet a legal deadline. The request may be made in person during a law library turnout or by use of a legal assistance receptacle.

B. *Photocopying*

ADOC must provide the necessary copies of eligible legal papers and court-related documents within 48 hours of a request by a Central Unit prisoner; this period shall be less if necessary to meet a legal deadline. The request may be made in person during a law library turnout or by use of a legal assistance receptacle. ADOC may charge a reasonable rate for this service, up to five cents per page.

Eligible legal papers and documents include petitions, complaints, answers, motions, affidavits, exhibits, memoranda and briefs, including attachments and appendices, and materials needed for discovery and investigation, including interrogatories and freedom of information requests. ADOC shall advise staff that prisoner legal materials are confidential and should not be read. Legal materials submitted for copying may be initially examined, but not read, to determine eligibility.

C. *Typewriters*

Central Unit prisoners may possess typewriters and necessary accessories. ADOC shall also provide an adequate number of functioning typewriters in the law library and

other appropriate locations for prisoner use in the preparation of legal papers. For the library, this minimally requires a one-to-five ratio of electric typewriters-to-law library capacity; such typewriters must be covered by a service contract or other professional repair system used at the CU.

D. *Supplies*

The Central Unit shall have sufficient quantities of basic legal supplies regularly available for purchase by prisoners. Such supplies minimally include pens, pencils, legal pads, typing paper, typewriter ribbons, ko-rec-type or equivalent, file folders, regular size and manila envelopes, postage and brief covers and bindings. A reasonable price may be charged for these items, within the departmental guideline of a ten percent above cost maximum mark-up. The prices of all items, legal or otherwise, available for purchase in the Central Unit must be publicized prior to ordering by prisoners. Subject to usual security and search procedures, prisoners may receive any basic legal supplies, books, and materials by delivery or mail from outside persons, organizations or businesses.

IV. *INDIGENT PRISONERS*

A. *Eligibility*

Subject to the requirements contained herein, a prisoner shall be provided basic legal supplies and services at ADOC expense if: (a) he has less than \$46.00 in his prison account on the date of the request, and (b) there have been less than \$46.00 in total deposits to his account in the 28-day period ending on the date of the request. A prisoner who meets (a) but not (b) shall be provided those specific supplies and services required to meet an imminent and documented legal deadline, and a written statement of the costs of these. If this occurs, ADOC may, with written notice to the prisoner, debit the prisoner's account whenever and to the extent that his

balance exceeds \$46.00 until the cost of the emergency items is repaid.

ADOC shall regularly adjust the above cut-off figure in order to adequately insure a prisoner's access to basic legal supplies and services without sacrificing basic hygiene needs. The adjustment shall occur at least every twenty-four months beginning the date of entry of this Order. It shall minimally be the percent change in the U.S. Consumer Price Index for the previous twenty-four months multiplied by the existing cut-off figure. The resulting new cut-off figure shall be rounded to the nearest fifty-cents.

B. *Supplies and Services*

1. *Supplies*

Upon request the following supplies shall be provided to eligible prisoners; the numbers in parentheses indicate the minimum amount of the items that must be provided for one week: pens (1), pencils (1), typing paper (10 sheets), legal pad (1), file folders (1), and regular envelopes (4). Brief covers and bindings, manila envelopes, and additional amounts of the above supplies shall be provided if necessary to meet a court deadline or requirement. Upon request, an eligible prisoner possessing a typewriter shall also be provided one typewriter ribbon and one ko-rec-type or equivalent, each week.

ADOC may require that the requesting prisoner check the specific items needed for legal research or preparation of legal papers during the next week. Pursuant to Section II(F)(4), the prisoner should indicate which, if any, of the supplies should be delivered directly to his legal assistant for work on his case.

2. *Postage*

Postage shall be provided for all legal mail for eligible prisoners. Legal mail includes letters and documents sent to a court, to an attorney, to a legal agency or organization or a pro se opposing party.

C. *Photocopying*

Eligible prisoners shall be provided the necessary copies of legal papers and court related documents as described in Section III(B).

All legal materials are confidential; those submitted for copying may be initially examined but not read, to determine eligibility. The prisoner shall minimally be provided with the number of copies of a document required by the court, plus one copy for the opposing party and one for his records.

D. *Request Procedure*

The request procedures and forms shall comply with the applicable requirements of Section I(C). The request may be completed and delivered in person during a law library turnout or placed in the appropriate receptacle. The prisoner should indicate that to his knowledge he meets the eligibility requirements, which supplies and services are required for the next week, and which should go to his legal assistant.

E. *Response Procedure*

Law library staff or clerks shall collect the prisoner request forms from each deposit point at least once each day. ADOC shall deliver the requested supplies or services to an eligible prisoner or designated legal assistant within 48 hours of the request; this period shall be less if necessary to meet a legal deadline. A prisoner shall be provided written notification of a denial of all or part of his request, with the specific reasons and factual basis, within 48 hours of the request. If required by the closing of the Business Office on Saturday and Sunday, processing of a request submitted on Friday, Saturday or Sunday may be delayed until the following Monday.

V. *IMPLEMENTATION*

A. *Notice*

Plaintiffs may transmit this Order to members of the plaintiff class by mail or delivery of identified copies to the CU, and may provide ADOC with additional copies that will be kept on reserve in the Central Unit law library and made available to prisoners during library turnouts. Plaintiffs or the Special Master will provide ADOC with a summary of this Order which shall be made regularly available in the law library and all housing areas.

B. *Special Master*

All orders concerning the powers, payment and responsibilities of the Special master, Professor Daniel J. Pochoda, are herein incorporated. Above references to the Special Master include his authorized representatives and assistants.

2
No. 94-1511

Supreme Court, U.S.

FILED

APR 14 1995

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SAMUEL LEWIS, *et al.*,

Petitioners,

vs.

FLETCHER CASEY, JR., *et al.*,

Respondents.

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Whether the district court correctly found a violation of the right of meaningful access to the courts under Bounds v. Smith, 430 U.S. 817 (1977).

2. Whether the remedy adopted by the district court constitutes an abuse of discretion.

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BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

The respondents respectfully urge the Court to deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on December 27, 1994. Casey v. Lewis, 43 F.3d 1261 (9th Cir. 1994), Pet. App. A.

STATEMENT OF THE CASE

On January 12, 1990, twenty-two prisoners filed this class action lawsuit, pursuant to 42 U.S.C. § 1983, challenging the policies and practices of the Arizona Department of Corrections with regard to, inter alia, access to the courts.

Following a three-month bench trial, the district court found that several policies of the Arizona Department of Corrections violated the prisoners' right to meaningful access to the courts. Casey v. Lewis, 834 F. Supp. 1553 (D. Ariz.

1992), Pet. App. B. The court's primary findings related to the circumstances of two overlapping groups of prisoners: those who are unable to use a law library on their own because of literacy problems or problems with English, and those without direct access to law library books. The district court's findings are briefly recounted below.¹

1. Illiterate Prisoners

In 1989, a system-wide study of prisoners within the Arizona Department of Corrections established that 35% of the adult incarcerated population had a reading level of seventh grade or below. Casey, 834 F. Supp. at 1558, Pet. App. B at 25a. The district court found that those

¹ The district court made numerous factual findings regarding the legal access system provided to prisoners. Petitioners' challenge to those findings was rejected by the court of appeals. See Casey v. Lewis, 43 F.3d at 1266-1270, Pet. App. 4a-13a (adopting findings of the district court).

prisoners who lack functional literacy or who lack English skills are unable to research the law without assistance. Id. As a result of the inability to receive adequate legal assistance, prisoners with literacy problems have had their cases dismissed with prejudice or have been unable to file legal actions. Id.

2. Prisoners Without Direct Access to a Law Library

The district court found that, in most facilities, prisoners in lockdown status have no physical access to the law library. 834 F. Supp. at 1556, Pet. App. B at 21a. Instead, they are allowed to request legal materials by sending a written request, known as a "kite," to the law library. The number of books that can be requested, and the length of time books can be kept, are restricted. 834 F. Supp. at 1557, Pet. App. B at 24a. Often, such prisoners are denied law books unless they

can provide an exact citation. 834 F. Supp. at 1557, Pet. App. B at 22a. They also experience long delays in receiving requested legal materials or legal assistance. Id. Some prisoners in lockdown status are denied even this privilege, leaving them without any access to legal materials. The district court found that prisoners who are subject to these procedures experience "severe interference" with their access to the courts. 834 F. Supp. at 1556, Pet. App. B at 22a.

In other facilities, general population prisoners are allowed physical access to the law library but are not allowed access to the shelves; instead, they must request legal materials from untrained prisoner law clerks or security officers. 834 F. Supp. at 1555, Pet. App. B at 19a-20a. This method of obtaining

access to law books also exists at two lockdown facilities, where prisoners are required to conduct their legal work in cages in the law libraries. 834 F. Supp. at 1556, Pet. App. B at 20a.

3. Sources of Assistance for Illiterate Prisoners and Prisoners Without Direct Access to a Law Library

The district court found that most of the law libraries are staffed by security staff and prisoner law clerks. See 834 F. Supp. at 1558-59, Pet. App. B at 26a-27a. Law clerks and staff, however, are restricted to providing prisoners with requested materials; they do not perform research or assist in drafting. 834 F. Supp. at 1559, Pet. App. B at 28a.

For illiterate prisoners and prisoners without direct access to a law library, the petitioners' sole provision for research and drafting assistance consists of untrained prisoner legal

assistants. Id.² However, with regard to prisoners in lockdown status, legal assistants can help only those prisoners with a disciplinary charge or a criminal charge pending. 834 F. Supp. at 1556, Pet. App. B at 22a. Thus, with this exception, prisoners in lockdown status have no access to law books other than through the "kite" system described above, and no assistance from anyone with legal training.

The district court found that there were an insufficient number of legal assistants available to assist prisoners who need legal assistance. 834 F. Supp. at 1559, Pet. App. B at 28a. Moreover, the legal assistants frequently are not sufficiently skilled to provide prisoners

² Law clerks can assist their fellow prisoners only by giving them requested material from the law library stacks. In contrast, legal assistants can help other prisoners perform legal research and draft pleadings and letters to the court. 834 F. Supp. at 1559, Pet. App. B at 28a.

with meaningful assistance. 834 F. Supp. at 1560, Pet. App. B at 30a. Prisoner legal assistants are not required to have any legal training and, in most facilities, petitioners do not provide them with training. 834 F. Supp. at 1560-61, Pet. App. B at 30a-31a.

The district court also found deficiencies in the contents of the law libraries, 834 F. Supp. at 1561-62, Pet. App. B at 32a-33a, and in various other policies and practices, such as the lack of confidentiality in attorney-client telephone calls. See 834 F. Supp. at 1562-65, Pet. App. B at 35a-41a.

The district court appointed a special master to work with the parties to develop a remedy for these violations. Over the course of several months, the special master held five meetings with the petitioners, received five sets of comments

and objections from them, and, with their cooperation, developed the proposed remedy submitted to the court.

The district court then issued a permanent injunction in an unpublished order approving and modifying the remedy proposed by the special master. Pet. App. C at 57a-85a.

The petitioners appealed both the finding that prisoners had been unconstitutionally denied meaningful access to the courts and the district court's remedial order. The court of appeals affirmed the finding of a constitutional violation; it also approved the remedy in most respects. Significantly, however, the court of appeals vacated and remanded the remedial order to the district court, directing it to incorporate the petitioners' request for an opportunity to

object to the fees and expenses of the special master.

On May 2, 1994, the order of the district court was stayed by this Court, pending disposition of this petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS.

A. This Case Does Not Create a Conflict with Regard to the Scope of Legal Assistance for Prisoners Incapable of Using a Law Library Without Assistance.

The petitioners claim that the decision of the court of appeals in this case that the prison system must provide some form of assistance to prisoners who are incapable of using a law library on their own conflicts with decisions of other circuits. In support of this claim, petitioners cite Hooks v. Wainwright, 775 F.2d 1433, 1436-37 (11th Cir. 1985), cert.

denied, 479 U.S. 913 (1986), and Bee v. Utah State Prison, 823 F.2d 397, 398 (10th Cir. 1987), as holding that the bare provision of an adequate law library satisfies the constitutional right of meaningful access to the courts for all prisoners. However, neither of those cases stands for that principle.

In Hooks v. Wainwright, 536 F. Supp. 1330 (M.D. Fla. 1982), the plaintiffs sought a remedy that required the defendants to provide lawyers to assist prisoners; the prison officials asked the court to approve a library system including prisoner law clerks who were to be given a standardized training course³ -- that is, the prison officials offered the relief that was approved by the court of appeals in this case. The district court rejected the prison officials' plan. The prison

³ Id. at 1340.

officials then obtained a certified appeal of a very limited question: whether an adequate plan for legal access necessarily requires the provision of lawyers. See Hooks, 775 F.2d at 1433-34.

The court of appeals answered this question in the negative. It did not state, however, that the bare provision of law books would pass muster. Indeed, the Eleventh Circuit stated that law books are of no use to an illiterate prisoner. Id. at 1436. Hooks simply held that a prisoner who requires more assistance than the mere provision of a law library need not obtain that assistance from a lawyer. Id. at 1437.

Bee v. Utah State Prison involved an illiterate prisoner who was incarcerated in a facility without a law library. The facility provided legal services to prisoners through contract lawyers. 823

F.2d at 398. The prisoner complained that he was unable to obtain assistance from a lawyer past the initial pleading stage. The court held that the assistance of a lawyer through completion of the pleading for a federal habeas corpus or civil rights action satisfied the prisoner's right of access to the courts. Id.

Hooks and Bee addressed the narrow question of whether prisoners had a constitutional right to assistance by lawyers; they did not address the question of whether illiterate prisoners are entitled to a lesser form of assistance, such as fellow prisoners with some legal training. As they did not even address the question presented to the lower courts in this case, those cases can hardly be said to have provided a conflicting answer.

In fact, Bee and Hooks are consistent with the decisions of the other

courts of appeals that have addressed the level of assistance that must be provided to illiterate prisoners. Those courts, in harmony with the court below, have held that a plan for access to the courts that relies upon law libraries must provide some form of assistance for those prisoners incapable of using law libraries on their own. See, e.g., Knop v. Johnson, 977 F.2d 996, 1006 (6th Cir. 1992), cert. denied, 113 S. Ct. 1415 (1993); Valentine v. Beyer, 850 F.2d 951, 956-57 (3d Cir. 1988); Harrington v. Holshouser, 741 F.2d 66, 69 (4th Cir. 1984); Cruz v. Hauck, 627 F.2d 710, 721 (5th Cir. 1980); Battle v. Anderson, 614 F.2d 251, 254-56 (10th Cir. 1980). Significantly, neither the Eleventh Circuit in Hooks,⁴ nor the Tenth Circuit in

⁴ In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit that were handed down

Bee, indicated that it was overruling its earlier decision in Cruz or Battle, respectively.

The requirement that some form of assistance must be provided to those prisoners incapable of using a law library flows directly from Bounds v. Smith, 430 U.S. 817 (1977), which is fundamentally at odds with petitioners' position. Bounds held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers." Id. at 828 (emphasis added). In Bounds, the Court reviewed its earlier case law on access to the courts and concluded that earlier cases had consistently required states "to shoulder affirmative obligations to assure all prisoners

prior to the close of business on September 30, 1981.

meaningful access to the courts." Id. at 824 (emphasis added). The Court in Bounds distinguished "the access rights of ignorant and illiterate inmates ... unable to present their own claims in writing to the courts" from those of "inmates able to present their own cases." Id. at 823-824. The Court noted that for illiterate prisoners, a law library alone is not sufficient; meaningful access "require[s] at least allowing assistance from their literate fellows." Id. (emphasis added). This statement is consistent with the actual relief in Bounds, which included a plan for training prisoner law clerks as research assistants for their fellow prisoners⁵ even though the Court

⁵ See id. at 819.

characterized the plan as a "law library" plan.⁶

This reading of Bounds is reinforced by Bounds' discussion of Wolff v. McDonnell, 418 U.S. 539 (1974). The Court in Bounds noted that Wolff involved a prison that maintained an adequate law library. Bounds, 430 U.S. at 824. Wolff nonetheless affirmed a remand to determine if one appointed legal advisor was sufficient to handle prisoner needs for assistance for post-conviction relief and civil rights actions. 418 U.S. at 577-80.

Accordingly, the decision of the court below does not create a conflict among the circuits, and is consistent with this Court's decision in Bounds.

⁶ See id. at 821. Bounds did not address the adequacy of the specific plan because the plaintiffs had not sought certiorari on this issue.

- B. This Case Does Not Create a Conflict with Regard to Whether a "Library Plan" for Meaningful Access to the Courts May Require Some Form of Trained Prisoner Assistance to All Prisoners.

Petitioners claim that the lower courts in this case held that a "library plan" to provide meaningful access to the courts must provide all prisoners, even those able to use a library on their own, with the assistance of trained fellow prisoners, and that this ruling conflicts with that of other circuits. This claim is based on a faulty interpretation of the lower courts' rulings in this case. As the court of appeals noted, "Defendants erroneously assert that the injunction mandates legal assistance for all prisoners." Casey v. Lewis, 43 F.3d at 1271, Pet. App. A at 16a.

As noted above, the district court in this case concluded that the petitioners had denied the right of

meaningful access to the courts to two groups of prisoners -- those with literacy problems and those lacking direct access to a law library. The remedial order tracks this finding by stating that legal assistance should be provided to prisoners who "because of language factors or lack of access to the law library, or for other reasons, are unable to perform adequate legal research and writing." Pet. App. C at 69a.

In the course of developing a remedy, the special master offered to develop a plan in which the prisoner legal assistants would be available only to prisoners with literacy problems or without direct access to a law library. However, the petitioners stated that they did not wish to shoulder the administrative inconvenience of setting up and administering a system of eligibility for

the services of the prisoner legal assistants and would prefer to make those services available to all prisoners.⁷ On the basis of these discussions, the special master did not include any language establishing eligibility criteria for the services of the prisoner legal assistants.

Moreover, after the special master issued an initial draft of the proposed remedy, the petitioners filed five sets of objections over an eight-month period. In none of these objections did the petitioners contest the lack of eligibility criteria for the services of

⁷ The meetings of the special master with the parties were not recorded. As indicated in their brief in the court of appeals, respondents are prepared to establish on remand that the special master, during the formal meetings with the parties, asked petitioners if they would prefer an eligibility system, and was told that the petitioners preferred the existing system in which the Department of Corrections does not administer eligibility requirements for the services of the prisoner legal assistants.

the prisoner legal assistants.⁸ Thus, when petitioners complain at page 3 of their petition that they must provide trained legal assistants to all prisoners, they are complaining about a feature of the remedy they could have altered had they so chosen.

The court of appeals' ruling went no further than that of the district court. The court did not hold that a library plan necessarily requires assistance to prisoners who are able to use a law library on their own; indeed, it cited the provision of the remedial order stating that legal assistance is to be provided to

⁸ See Defendants' Objections to Implementation of the Gluth Injunction at Particular Facilities, Jan. 22, 1993; Defendants' Additional Objections/Modifications to Implementation of the Gluth Injunction to Particular Facilities, Feb. 19, 1993; Defendants' Objections to Plaintiffs' Proposed Modifications, March 19, 1993; Defendants' Additional Objections to Plaintiffs' Proposed Modifications, April 28, 1993; Defendants' Objections to the Special Master's Proposed Order, Aug. 13, 1993.

prisoners who "because of language factors or lack of access to the law library, or for other reasons, are unable to perform adequate legal research and writing." See Casey v. Lewis, 43 F.3d at 1271, Pet. App. A at 16a.

Accordingly, the lower court decisions cited by petitioners as creating a conflict are actually consistent with the decisions of the lower courts in this case. Cepulonis v. Fair, 732 F.2d 1, 6 (1st Cir. 1984), rejected a remedy involving law students in addition to an adequate law library in favor of the defendants' proposal that a prisoner law clerk assist his fellow prisoners. Similarly, the law library plan upheld in Lindquist v. Idaho State Bd. of Corrections, 776 F.2d 851, 857 (9th Cir. 1985), included prisoner law

clerks who were being trained in legal research and writing.⁹

Petitioners also cite Campbell v. Miller, 787 F.2d 217, 229-30 (7th Cir.), cert. denied, 479 U.S. 1019 (1986). Campbell involved an individual plaintiff who was neither illiterate nor denied direct access to a law library. Campbell does not address the issue of the assistance that prisons must provide to prisoners who are illiterate, denied access to a law library, or otherwise unable to use a law library. Moreover, Campbell does not specify whether the "trained legal assistance" it rejected as not required by

⁹ Even if Lindquist were inconsistent with the decision of the court of appeals in this case, such an intra-circuit conflict would not warrant review by this Court. See S. Ct. R. 10.1(a); see also Davis v. United States, 417 U.S. 333, 340 (1974). Such intramural differences are to be resolved by rehearing en banc, a remedy petitioners did not seek.

the Constitution involved prisoner law clerks, lawyers, or paralegals.

The last case cited by petitioners in support of their claim of a conflict is Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985). The court in Morrow stated its holding as follows: "[T]he bookmobile checkout system, accompanied by circumscribed assistance from law students, does not meet the Bounds requirement." Id. If anything, this holding appears to require even greater assistance to prisoners than was mandated by the lower courts in this case.

The petitioners assert that the court below, see Casey v. Lewis, 43 F.3d at 1270, Pet. App. A at 14a, recognized a conflict among the circuits as to whether any assistance must be provided to prisoners with access to an adequate law library. Read in context, however, the

court below simply makes the same points respondents make here: 1) the linchpin of Bounds is "meaningful access; and 2) bare physical access to a law library for prisoners who cannot read is not meaningful. If a prison opts to provide access to the courts through a "library plan," a district court may require the plan to include prisoners with some form of training to assist those prisoners who are unable to use a law library on their own.¹⁰

Accordingly, the petitioners have failed to identify any conflict among the

¹⁰ Prisoners with some minimal, uncertified training are not "persons trained in the law" under Bounds; they are rather part of an appropriate law library plan. If casually trained prisoner law clerks are "persons trained in the law," then a prison could satisfy its Bounds responsibilities through offering such clerks to assist other prisoners, without making adequate law libraries generally available. No court has suggested that such limited assistance to all prisoners could possibly satisfy Bounds.

circuits presented by the decision of the court below.

II. THIS CASE DOES NOT PRESENT THE ISSUE OF WHETHER "ACTUAL INJURY" IS REQUIRED IN CASES BROUGHT UNDER BOUNDS.

At page 8 of their petition, petitioners argue that "[d]uring trial, respondents presented no evidence whatsoever that illiterate or non-English speaking prisoners were actually denied access to the courts or that ADOC's efforts to assist them were insufficient." For several reasons, a grant of certiorari on this issue would be inappropriate.

First, regardless of whether a showing of actual injury was required in this case, the respondents in fact made such a showing. The district court made explicit findings based on evidence that prisoners with literacy problems had had their cases dismissed with prejudice, and had been unable to file legal actions as a

result of their inability to receive adequate legal assistance. 834 F. Supp. at 1558, Pet. App. B at 25a. The petitioners' challenge to these findings was rejected by the court of appeals. See Casey v. Lewis, 43 F.3d at 1267, Pet. App. A at 8a.

Accordingly, because the district court made explicit findings of "actual injury," this case is not an appropriate vehicle for the Court to determine whether, and to what extent, an "actual injury" requirement applies to cases under Bounds.

In addition, the issue of whether a showing of actual injury was required in this case was not squarely presented by petitioners to the court of appeals. The issue was not presented as one of the "Issues Presented for Review" in Petitioners' Opening Brief before the Ninth Circuit, see Appellants' Opening Brief at 3, and the brief did not present legal

argument on this issue.¹¹ It is presumably for this reason, as well as because respondents had proven actual injury, that the court of appeals found that "this issue [was] not ... before [it]." Casey v. Lewis, 43 F.3d at 1267, n.3, Pet. App. A at 6a n.3.¹²

¹¹ The petitioners' Opening Brief before the Ninth Circuit contains three references to this issue, each of which is simply a bald statement that respondents failed to make a showing of injury. At no point did they present legal argument as to whether such a showing was required.

¹² The court stated in the footnote that it did not have to reconsider Vandelft v. Moses, 31 F.3d 794 (9th Cir. 1994), which applied an "actual injury" requirement. As stated in the text, the court below had no reason to reconsider Vandelft because respondents here proved "actual injury."

Moreover, Vandelft involved only one isolated component of access in an individual case. A number of courts have developed principles for determining when a showing of "actual injury" is required. See Sowell v. Vose, 941 F.2d 32, 34 (1st Cir. 1991); Chardley v. Baird, 926 F.2d 1057, 1063 (11th Cir. 1991); Sands v. Lewis, 886 F.2d 1166, 1171 (9th Cir. 1989); Peterkin v. Jeffes, 855 F.2d 1021, 1041 (3d

It would be imprudent for this Court to grant certiorari on an issue that has not been passed on by the court below. Supreme Court Rule 17 specifies the considerations that guide the Court in determining whether to grant a petition for certiorari. Each of those considerations contemplates review of a decision of a federal court of appeals or a state court of last resort. Since the court of appeals did not pass on the issue of whether actual injury is required in this case, or in any other case brought under Bounds, there is no decision to review on this issue.

Cir. 1988); DeMallory v. Cullen, 855 F.2d 442, 448 (7th Cir. 1988). All of these cases suggest that no showing of "actual injury" was in fact required in this case, a class action involving the entire system under which the respondents attempt to gain access to the courts.

III. THE REMEDY, AS MODIFIED BY THE COURT OF APPEALS, WAS APPROPRIATE, NOT OVERLY INTRUSIVE, AND INCORPORATED THE LEGITIMATE CONCERNS OF THE PETITIONERS.

The responsibility of the Arizona Department of Corrections to provide meaningful access to the courts was established almost twenty years ago, when the Supreme Court issued its ruling in Bounds in 1977. The precise nature of that responsibility was specifically litigated in the context of the Central Unit at the Arizona State Prison at Florence. See Gluth v. Kangas, 773 F. Supp. 1309 (D. Ariz. 1988), aff'd, 951 F.2d 1504 (9th Cir. 1991) (finding a constitutional violation and imposing a remedy similar to the remedy in this case).

Nonetheless, the petitioners took no action to cure the same constitutional violations at other Department of Corrections facilities. Indeed, in March

1991 the petitioners rescinded a draft state-wide policy developed after Gluth that would have provided for Department of Corrections training and competency screening for the prisoner legal assistants.¹³

Despite this history, the district court set up a careful and deliberate consultative process to develop the appropriate remedy. In numerous respects, the special master modified the proposed order to accommodate the concerns and objections of petitioners.¹⁴ Indeed,

¹³ See Exh. 216 ¶ 5.3 (referring to training course for prisoner legal assistants). This reference to training was eliminated in a policy revision dated March 4, 1991. See Ex. 790.

¹⁴ See, for example, the commentary to the remedy, which notes that in response to defendants' concerns, the hours of operation of the law library were reduced; the number of facilities required to maintain law libraries was reduced; the expense for legal assistant training was reduced; the availability of notary services was reduced; and the time to

the district court explicitly stated its willingness to modify the injunction "for documented problems that occur during implementation." Order, Sept. 27, 1993, at 5. Accordingly, the order represents a thoughtful and cautious approach to remedying the constitutional violations, based on petitioners' suggestions and the experience accumulated under Gluth.

Moreover, petitioners' claim that the remedial order is overly intrusive is based on several characterizations of that order that are materially incorrect. For example, contrary to the statement at page 1 of the petition, the order does not require that every law library have a librarian, or that every librarian have a

respond to prisoner requests was increased. Pet. App. C at 81a-85a.

law or paralegal degree.¹⁵ Similarly, petitioners claim that "every prison unit with a capacity of 150 inmates" must provide a fully equipped law library. Petition at 3. In fact, the order does not require the defendants to build a single law library because it exempts from this requirement those facilities that do not already have a law library. See Pet. App. C at 61a. These exemptions were responsive to petitioners' request that those prisons without law libraries not be required to build them. See Pet. App. C at 81a.

Petitioners claim that the remedial order requires law libraries to be

¹⁵ See Pet. App. C at 66a-67a (stating that librarian can provide services for two law libraries, provided that second facility meets size limitations; and requiring that librarians must have library science, law or paralegal degree, with preference in hiring to person with law or paralegal degree. The order does not require petitioners to pay more in order to hire staff with law or paralegal degree).

open fifty to eighty hours per week, regardless of demand. Petition at 3. In fact, the remedial order sets a basic requirement of fifty hours per week, with an increase in those hours required only for those facilities that place certain restrictions on prisoner access to the law library. Pet. App. C at 62a.¹⁶ Thus, petitioners have the option of limiting the hours at each library to fifty per week. Any claim that this will impose undue burdens on petitioners is undercut by a document they submitted to the court of appeals that indicates that many of the law

¹⁶ These provisions were based on a factual finding by the district court that, at the time the action was filed, prisoners had insufficient time to use the law libraries. 834 F. Supp. at 1565, Pet. App. B at 41a.

libraries already operate for at least fifty hours per week.¹⁷

The petition also indicates that the remedy requires a legal assistant training program of "approximately 60 hours in length to be taught by lawyers, law students, or trained paralegals at each law library twice a year, ad infinitum." Petition at 3. Most of the training will be provided by videotape. Pet. App. C at 71a-72a. The minimum total hours of training required, including viewing videotapes, is fifty, not sixty. Id. The order contemplates that the live training will be provided by employees of the Department of Corrections. Pet. App. C at 84a. Thus, the major expenditure is a one-time preparation of a videotape; the order contemplates that these training

¹⁷ See Reply Brief of Defendants/Appellants, Appendix I, in the Ninth Circuit Court of Appeals.

requirements will engender "little additional or ongoing costs." Id.

Petitioners state at page 4 that the order "allow[s] inmates direct access to the library stacks, unless petitioners can first document an actual security risk." In addition to provisions for limiting shelf access, however, the petitioners are also allowed to deny any library access to certain prisoners. See Pet. App. 61a. This provision for delaying or denying access contains precisely the same language as the current policy of the Arizona Department of Corrections.¹⁸

Nor is it the case that the remedial order allows prisoners to regulate the time and manner in which they gain access to law libraries, as petitioners

¹⁸ Compare Pet. App. C at 61a with Ex. 216 ¶ 6.22. Understandably, in light of this fact, the petitioners, in their five sets of objections, see supra note 8, never challenged or criticized this provision.

contend. Petition at 4. A review of the remedial order demonstrates that, within broad parameters necessary to ensure actual access to a law library, the petitioners select the schedule of library operations, determine which prisoners are not eligible for direct access to a law library collection, establish the procedure by which a prisoner requests permission to use the law library, determine when a particular request for access to a law library cannot be honored, and determine when to reserve specific parts of the law library for prisoners with different classifications. See Pet. App. C at 61a-65a, 83a.

Finally, petitioners erroneously claim that the order's requirement that the law libraries include a set of Pacific Reporters is "directly contrary" to this Court's decision in Bounds. See Petition

at 10-11 n.8. In Bounds, the Court expressly declined to address the adequacy of the law library contents because certiorari had not been granted on that issue. See Bounds, 430 U.S. at 821 n.7. Moreover, the remedial order allows the Arizona Department of Corrections to discontinue its subscriptions to the Arizona Reporters.¹⁹ See Pet. App. C at 69a. The requirement to maintain Pacific Reporters serves as the functional equivalent of the requirement to maintain sets of state reporters noted in Bounds, 430 U.S. at 819 n.4.²⁰

¹⁹ At any rate, the effect of this provision should be minimal, since petitioners informed the district court that many of the law libraries already contain Pacific Reporters. Defendants' Additional Objections/Modifications to Implementation of the Gluth Injunction to Particular Facilities, Feb. 19, 1993, at 6.

²⁰ The petitioners also take issue with the fees charged by the special master appointed by the district court. See Petition at 2 n.2. The amount of those

Accordingly, this case does not afford the Court an appropriately focused opportunity to review questions regarding the district court's discretion to fashion remedies for constitutional violations.

CONCLUSION

For the reasons set forth above, respondents respectfully request that the Court deny the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

fees is not presented for certiorari because the petitioners have already obtained the relief that they requested on this issue. The court below vacated and remanded this issue to the district court, directing it to incorporate into the remedial order petitioners' request for an opportunity to object to the fees of the special master. In light of this remand, respondents will reserve for the district court their disagreements with the assertions made by petitioners on this issue.

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(3)
No. 94-1511

Supreme Court of the United States

FILED

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OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

SAMUEL LEWIS, *et al.*,
Petitioners,
v.

FLETCHER CASEY, JR., *et al.*,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITIONERS' REPLY MEMORANDUM

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In their Brief, respondents set forth several arguments which are identical to arguments presented in their response to petitioners' stay application. Passage of time has not made these arguments any more persuasive than when this Court granted petitioners' stay. The conflicts in the circuits are real, and as revealed by the conflicting opinions, respondents' attempt to explain them away is unavailing. Particularly astounding is the denial of a conflict which was specifically recognized by the Ninth Circuit in this case.

It is no coincidence that eighteen states filed in petitioners' behalf. These states see both the conflict in the circuits and the district court's attempt to micromanage Arizona's prison system as a problem sufficiently serious to warrant review.

I. THE CIRCUITS CONFLICT ON PRISONER ACCESS TO THE COURTS

Regarding access for prisoners who speak English and are literate, the circuit courts conflict on whether *Bounds* requires either law libraries or legal assistance from persons trained in the law, or whether *Bounds* requires both. The majority of circuits holds that *Bounds* does not require both. See *Cepulonis v. Fair*, 732 F.2d 1, 6 (1st Cir. 1984); *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 855 (9th Cir. 1985); *Campbell v. Miller*, 787 F.2d 217, 229-30 (7th Cir. 1986); and *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985). Other circuits have required both. See *Battle v. Anderson*, 614 F.2d 251, 255-256 (10th Cir. 1980) *Kendrick v. Bland*, 586 F. Supp. 1536, 1549 (W.D. Ky. 1984); and *Glover v. Johnson*, 478 F. Supp. 1075, 1096 (E.D.Mich. 1979). Certiorari must be granted to resolve this conflict, which the Ninth Circuit in this case specifically recognized. App. A at 14a; 43 F.3d at 1270.¹

The circuit courts also conflict on access for illiterate inmates. *Hooks v. Wainwright*, 775 F.2d 1433, 1436-37 (11th Cir. 1985) and *Bee v. Utah State Prison*, 823 F.2d 397, 399 (10th Cir. 1987) hold that illiterate or non-English speaking inmates are not entitled to more than constitutionally adequate law libraries. *Cruz v. Hauck*, 627 F.2d 710 (5th Cir. 1980) and *Knop v. Johnson*, 977 F.2d 996 (6th Cir. 1992) hold that these inmates are entitled to law-trained legal assistants in addition to libraries. Certiorari must be granted to resolve this conflict.²

¹ Respondents' assertion that petitioners may hire librarians without law or paralegal degrees misstates the record. On January 14, 1994, the special master mandated that petitioners must hire *only* librarians with law or paralegal degrees.

² Petitioners categorically deny the unsupported assertion (at 18) that they declined an "eligibility program" for providing legal assistants only to illiterate inmates. Moreover, even if there had

II. THE ACTUAL INJURY QUESTION MUST BE RESOLVED

This Court must decide whether the Ninth Circuit erred in placing the burden *upon petitioners* to demonstrate that their chosen methods of access were adequate. Respondents bear the burden of demonstrating actual injury, *Vandelft v. Moses*, 31 F.3d 794 (9th Cir. 1994), and they failed to come forward with such evidence.³ Absent such evidence, respondents lack standing to bring their claim, an issue of subject matter jurisdiction that this Court must address regardless of its presentation by the parties below. *Bender v. Williamsport Area School District*, 475 U.S. 534, 542 (1986).

III. THE DISTRICT COURT'S REMEDY INAPPROPRIATELY INTRUDES ON PRISON ADMINISTRATION

Respondents' failure to even address the district court's extreme micromanagement of prison administration and its disregard for the "reasonable relation" test,⁴ bespeaks the weakness of their position. No case supports the detailed injunction imposed in this case.⁵ In fact, such

been such an offer, it would have been meaningless because the special master refused to cap the number of legal assistants. Petitioners would be forced to train any inmate who wanted to be a legal assistant, as long as they were otherwise qualified.

³ The district court's "finding" that two inmates suffered actual injury is flatly unsupported by the record. Petitioners stand by their recitation of the facts in their petition, which is supported by the record.

⁴ allowing infringements on prisoners' constitutional interests that are reasonably related to legitimate penological interests

⁵ *Gluth v. Kangas*, 951 F.2d 1504 (9th Cir. 1991) does not support respondents' position that the injunction here is appropriate. *Gluth* involved an access question for *one* unit within the Florence facility. The *Gluth* plaintiffs' statement of facts in support of their motion for summary judgment went unopposed by the defendants. Due to the defendants' virtual default, the Ninth Circuit had no choice but to affirm the district court's order. In this case, petitioners presented *extensive* evidence that prisoners had meaningful

intrusion threatens petitioners' ability to maintain adequate security⁶ and directly contravenes the principle requiring federal court deference to state prison management. *Thornburgh v. Abbott*, 490 U.S. 401, 407-408 (1989); *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 764 (1992). The injunction far exceeds the constitutionally-required minimum standards for prisoner access and violates the separation of powers.

CONCLUSION

Respondents' current opposition merely parrots the unsuccessful arguments they made in response to petitioners' stay application. Their arguments are no more persuasive now. The Petition for Writ of Certiorari should be granted.

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access to the courts. The district court ignored this evidence and issued an injunction virtually identical to *Gluth*, to be applied to all other units within petitioners' prison system. Moreover, petitioners' opportunity to "object" in this case was virtually meaningless; they had no opportunity to object to the systemwide application of the *Gluth* plan.

⁶ For example, respondents' assertion (at 33) that petitioners have the option to limit the libraries' hours to only 50 per week is ludicrous. The 50 hour limit applies only to minimum security units; petitioners would have to make every unit a minimum security unit in order to exercise this "option."

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Petition For Writ Of Certiorari
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BRIEF OF AMICI CURIAE STATES OF
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IDAHO, KENTUCKY, MASSACHUSETTS,
MICHIGAN, MINNESOTA, MONTANA, NEVADA,
NEW JERSEY, NEW YORK, OHIO, OREGON,
RHODE ISLAND, UTAH AND VERMONT
IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court's order in this "access to courts" case, which greatly expanded the State of Arizona's financial and administrative burdens and shifted much of the management of the state's prison system to the federal judiciary, exceeds the constitutional requirements set forth in *Bounds v. Smith*, 430 U.S. 817 (1977).

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INTEREST OF THE AMICI CURIAE

This brief in support of the Petition for Writ of Certiorari filed by prison officials of the Arizona Department of Corrections, is submitted on behalf of the State of California and the other signature States ("the Amici States") through their Attorneys General pursuant to Supreme Court Rule 37.5. The Amici States have an important interest in this case because they all operate correctional facilities in which they must assist the persons whom they incarcerate in obtaining access to courts.

The Court of Appeals for the Ninth Circuit has affirmed an order of the District Court of Arizona which would dramatically expand the physical access to law libraries that states must allow prisoners, the legal materials they must be provided, and the legal assistance from highly qualified individuals which must be available to all prisoners, even literate prisoners who have physical access to a law library. *Casey v. Lewis*, 43 F.3d 1261 (9th Cir. 1994). This is based in part on the lower courts' failure to limit the scope of access to courts to the filing of habeas corpus petitions and civil rights complaints. The lower courts' decisions are explicitly based only on the language used by this Court in *Bounds v. Smith*, 430 U.S. 817, 828 (1977) that requires prison officials to "assist inmates in the preparation and filing of *meaningful* legal papers. . . ." (emphasis added).

As noted by petitioners, in order to provide "meaningful" access Arizona prison officials have been ordered to:

Open their law libraries between 50 to 80 hours per week, including night and weekend hours, regardless of demand;

Provide fully equipped law libraries at every prison unit that has a capacity of 150 or more inmates;

Hire full-time, professionally trained librarians with law or paralegal degrees for every law library;

Provide extensively trained inmate legal assistants to all inmates, even if the inmates are literate and have physical access to a law library;

Provide a legal assistant training program, including a legal research course of approximately 60 hours in length to be taught by lawyers, law students, or trained paralegals at each law library twice a year;

Provide a weekly minimum of three 20-minute telephone calls to an attorney, an attorney representative, or a legal organization;

Purchase a complete up-to-date set of regional reporters and digests, in addition to state reporters and digests, for each law library;

Allow inmates to regulate the time, place and manner in which they gain access to and utilize the law library and legal assistants; and

Allow inmates direct access to browse in the library stacks, unless prison officials can first document an actual security risk.

In California alone there are currently 29 prisons border to border across a state of 159,000 square miles.

The state incarcerates more than 126,000 inmates. To comply with the order affirmed by the Court of Appeals in this case, California would have to add an unprecedented amount of library facilities and staff and make substantial operation changes, all at a significant cost and risk to prison security.

A typical California prison houses approximately 4,000 inmates in about four semi-autonomous facilities. To meet the library access requirement approximately four new full libraries would have to be opened at every prison for a total of at least 116 prison libraries. An equal number of qualified librarians would also have to be hired. California already has difficulty finding a sufficient number of qualified librarians to staff its existing libraries. Opening these additional libraries would likely require the conversion of existing inmate program space. If these libraries were to be open five days a week they would have to be available for inmate use 24 hours per day to fulfill the requirements of the order in this case.

The inmate legal assistance program prescribed by the lower courts would severely threaten prison security by placing the inmate assistants in a position of power and influence over the inmates they are assisting. The program also gives inmates power over the administrators by providing them with labor rights similar to prison employees.

Allowing inmates direct access to the library stacks may adversely affect the availability of books because they can more readily be destroyed by inmates without

any way of accounting for which inmate may have been responsible. Direct access also presents security problems in that inmates can easily pass notes to each through the unchecked use of the library books.

While the numbers may not be as great in the other Amici States, the impact of being compelled to comply with the standards set forth by the lower courts in this case would be proportionately severe on all Amici States, especially given that the number of cases filed in 1993 rose by 14 percent and inmate filings rose by 10 percent even without the solicitude shown by the Ninth Circuit in the instant case. Rehnquist, 1993 *Year-End Report on the Federal Judiciary* (1994) at 5, fn. 2.

REASONS FOR GRANTING THE PETITION

Introduction

This case presents important questions of federal law which have not been, but should be, settled by this Court concerning the scope of the duties of prison officials under *Bounds v. Smith*, 430 U.S. 817. In addition, many portions of the decision of the Court of Appeals conflict with this Court's decision in *Bounds*.

Dissenting in *Bounds*, then-Justice Rehnquist wrote that the majority's analysis "places questions of prisoner access on a 'slippery slope. . . ." *Id.* at 837. While the present case clearly represents the extreme, the divergent views of the courts in cases decided after *Bounds* demonstrate the need for further clarification and analysis.

In *Bounds*, this Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828. " 'Meaningful access' to the courts is the touchstone." *Id.* at 823, quoting *Ross v. Moffitt*, 417 U.S. 600, 616 (1974). The Court noted that its "main concern" was " 'protecting the ability of an inmate to prepare a petition or complaint.' " *Id.* at 828, n.17, quoting *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974).

The Court of Appeals for the Eleventh Circuit aptly noted that "*Bounds* was a limited decision" which was the "culmination of a series of cases holding that imprisonment should not deprive persons of access to courts." *Hooks v. Wainwright*, 775 F.2d 1433, 1436 (11th Cir. 1985), cert. denied, 479 U.S. 913 (1986). Summarizing *Bounds* and the decisions on which it was based, the Eleventh Circuit stated:

All of these decisions simply removed barriers to court access that imprisonment or indigency erected. They in effect tended to place prisoners in the same position as non-prisoners and indigent prisoners in the same position as non-indigent prisoners.

Id. at 1436.

The decision in the current case is the complete antithesis of a "limited" decision. Seizing on the word "meaningful," the Ninth Circuit greatly expands the right of access to courts for prisoners beyond anything either

held or suggested in the *Bounds* opinion.¹ Certiorari should be granted to address the following issues of great importance:

1. The opinion in *Bounds* states repeatedly that the right of access to courts encompasses only the filing of habeas corpus petitions and civil rights complaints. See *id.* at 823 (discussing holding in *Johnson v. Avery*, 393 U.S. 483, 489 (1969) that ban on inmate assistance effectively prevented some prisoners from preparing petitions to challenge legality of their confinement and extension of that holding to civil rights actions in *Wolff v. McDonnell*, 418 U.S. at 577-580); 825 ("inquiry is rather whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts" and discussion of basic requirements for filing of habeas corpus petition or civil rights complaint); 827 ("in this case, we are concerned in large part

¹ The expansive nature of the order in this case concerning access to courts involves the federal judiciary in a broad range of prison operational issues. In *Murray v. Giarratano*, 492 U.S. 1, 11 (1989), this Court noted that the constitutional origin of the right of access to courts is still shadowy. "The prisoner's right of access has been described as a consequence of the right to due process of law, see *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), and as an aspect of equal protection, see *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987)." *Id.* at 11, n.6. Indeed, in *Bounds*, each of the dissenting opinions questioned whether there was any constitutional right of access to court. *Bounds*, 430 U.S. at 834-835 (Burger, C.J., dissenting), 836-837 (Stewart, J., dissenting), 837-841 (Rehnquist, J., dissenting). Amici submit that a constitutional right of such questionable underpinnings and scope should not form the basis of such a gross intrusion into prison administration.

with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights" and emphasizing that "habeas corpus and civil rights actions are of 'fundamental importance . . . in our constitutional scheme . . . '"); 828 n.17 ("our main concern here is 'protecting the ability of an inmate to prepare a petition or complaint.'").

The decision in this case fails to recognize the limited scope of the constitutional right of access to courts. While the Court of Appeals never expressly states that the right encompasses more than the filing of petitions for writs of habeas corpus and civil rights complaints, its expansive view is implicit throughout the opinion. For example it affirms the district court's requirement that defendants offer a 30-40 hour videotape instruction course for all prisoners. The district court required that

Doctrinal areas of most concern to prisoners should be covered, including 42 U.S.C. Section 1983 and other major civil rights laws; prison practices, including disciplinary and classification measures; *relevant tort and civil law, including immigration and family issues*, and relevant areas of criminal procedure, including appeals, collateral attacks, Habeas Corpus and time computations.

Casey, 43 F.3d at 1277 (emphasis added).

This Court should grant certiorari to resolve the critical issue of the scope of the right of access to courts.

2. In *Bounds*, this Court expressly held that prison officials could satisfy their duty of providing access to courts either by providing access to an adequate law library or by providing prisoners with assistance from

persons trained in the law. Discretion was to be afforded prison officials in choosing whether to select one of those alternatives or some combination of books and trained staff. *Bounds*, 430 U.S. at 828, 830-831. The decision in this case obliterates that discretion and micro-manages the prisons in the name of access to courts. It requires that every library employ staff who possess a law or a paralegal degree. *Casey*, 43 F.3d at 1268, 1275. These highly trained professionals must be available to assist all inmates.² *Id.* at 1267-1268.

In *Hooks v. Wainwright*, 775 F.2d at 1436, the Court of Appeals stated that the facts that many prisoners are illiterate and that non-lawyers cannot provide those inmates with the same level of assistance as lawyers are so obvious that "[i]t presses credulity to contend that the Supreme Court in *Bounds* intended that there would be a constitutional right to legal counsel, if it were found that some prisoners were illiterate and that non-lawyers could not use the libraries as well as lawyers." Nevertheless the Ninth Circuit in this case, as well as several other courts, have found that prison officials must provide inmates with assistance from persons trained in the law. See generally, *Knop v. Johnson*, 977 F.2d 996, 1006 (6th Cir. 1992), cert. denied, *Knop v. McGinnis*, ___ U.S. ___, 113 S.Ct. 1415

² The Court of Appeals takes a very broad view of illiteracy, including within that category not only inmates who cannot read but also inmates who cannot read at a high school level. The Court of Appeals found that 35 percent of the inmates cannot read English above a seventh grade level and that 14.5 percent cannot speak English. *Id.* at 1270. Thus, under the decision in this case, prison officials must provide specialized legal assistance to as many as 50 percent of the prisoners.

(1993); *Valentine v. Beyer*, 850 F.2d 951, 956-957 (3d Cir. 1988); *Cruz v. Hauck*, 627 F.2d 710, 721 (5th Cir. 1980). The conflicting decisions of the appellate courts as well as the importance of this issue necessitate granting the petition in this case.

3. This Court has consistently recognized that even prisoners' constitutional rights must yield to the legitimate penological interests of prison administrators. E.g., *Turner v. Safley*, 482 U.S. 78, 89 (1987). In this case, the Court of Appeals failed to consider the legitimate interests of prison administrators in the safe and orderly running of the prisons when it uncritically upheld every aspect of an order that requires that all prisoners, with the exception of those found guilty of specific acts of misconduct, must not only be able to go to the law library but that prisoners must also be able to browse through the library stacks. *Casey*, 43 F.3d at 1266-1267.

There are two fundamental flaws in this holding. First, nothing in *Bounds* suggests that the use of a law library requires that a prisoner be physically present in the library itself. It is the access to the books themselves, not the physical plant, which is the key to meaningful access. Moreover, assuming that inmates must be allowed to visit the library, the requirement that they be allowed to browse through the stacks is nonsensical. Previous decisions of the Ninth Circuit and the Fourth Circuit have found that "legal research often requires browsing through various *materials* in search of inspiration. . . ." *Toussaint v. McCarthy*, 801 F.2d 1080, 1110 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987), quoting *Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978), cert. denied, 441 U.S. 911 (1979) (emphasis added). Browsing through materials

is quite different from browsing through library stacks. While a person may need to review a number of digests or case reporters to discover and develop a legal theory, this is not accomplished by strolling the aisles of a library. Thus, there is simply no basis for the order requiring prison officials to permit inmates the freedom to roam through the library stacks.

Assuming *arguendo* that a right might be found to go to the library and to browse through the stacks, the Ninth Circuit erred when it failed to consider any reasonable security or operational concerns of prison officials as required under *Turner*. This Court should grant certiorari to determine with unmistakable clarity 1) whether inmates have a right to physical access to a law library; 2) if so, whether that right includes browsing through the library stacks; and 3) if these rights exist, whether they are outweighed by prison officials' legitimate security concerns.

4. The prior decisions of this Court have not recognized that prison officials have some constitutional duty to assist inmates in obtaining access to courts beyond preparing a petition or complaint. *Bounds*, 430 U.S. at 828, n.17; *Wolff*, 418 U.S. at 576. Accordingly, at least two circuits have held that the state's affirmative obligation to assist prisoners in the preparation of legal papers ends after the filing of an initial petition or complaint. *Bee v. Utah State Prison*, 823 F.2d 397, 398-399 (10th Cir. 1987); *Carter v. Fair*, 786 F.2d 433, 435-436 (1st Cir. 1986). The decision of the Court of Appeals in this case fails to recognize any limits on the constitutional duty of state prison officials to assist state prisoners to file lawsuits

against the same state officials. This Court should grant certiorari to resolve this important issue of law.

5. Several circuits, including two prior panels of the Ninth Circuit, have held that prisoners challenging the adequacy of a legal access policy bear the burden of showing that the prison's policies resulted in an instance in which the prisoner was actually denied access to a court. *Vandelft v. Moses*, 31 F.3d 794, 796 (9th Cir. 1994); *Shango v. Jurich*, 965 F.2d 289, 292-293 (7th Cir. 1992); *Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989); *Peterkin v. Jeffes*, 855 F.2d 1021, 1041 (3d Cir. 1988). The Court of Appeals in this case, for reasons left unknown, stated that the issue of actual injury was not before it, although the issue had been raised by the prison officials. *Casey*, 43 F.3d at 1267 n.3. In the cases cited above, however, the courts were of the view that for any access issue other than the core issues of *Bounds* – adequacy of the library or legal assistance – the prisoner always bears the burden of proving an actual injury. Certiorari should be granted to resolve the issue of whether proof of a violation of access to courts – other than the core *Bounds* issues – always requires that the prisoner demonstrate that he or she has actually been denied access to courts.

6. Critical to this Court's affirmance of the lower court's judgment in *Bounds* was its observation that, following a finding that the prison administrators had violated the inmates' right of access to courts, "the courts below scrupulously respected the limits in their role." 430 U.S. at 832. This Court noted that the district court in *Bounds*

did not thereupon thrust itself into prison administration. Rather, it ordered petitioners themselves to devise a remedy for the violation, strongly suggesting that it would prefer a plan providing trained legal advisors. Petitioners chose to establish law libraries, however, and their plan was approved with only minor objections over the strong objections of respondents.

Id. at 832-833. In the years since *Bounds* was decided, this Court has continually reaffirmed the deference owed to prison officials in the administration of this nation's prisons. *E.g.*, *Turner v. Safley*, 482 U.S. at 89; *Bell v. Wolfish*, 441 U.S. 520, 550 (1979).

The courts in this case have also expressed a clear preference for the use of legal assistants. *Casey*, 43 F.3d at 1268. Rather than defer to the discretion of prison administrators, however, they have fully directed the operation of virtually all aspects of the administrators' law library program.³ The district court's order in this case involves it in such minutiae as setting the hours in which libraries must be open, including evening and weekend hours; procedures for the collection of legal access requests;

³ In noting what it sees as the advantage of having legal assistance over libraries alone, the Court of Appeals refers to the possibility of mediation of prisoner complaints that currently place a burden on it. *Id.* at 1268 n.6. Amici States are well aware of the burdens placed on them and on the courts in which they practice by the ceaseless growth of inmate litigation. Whatever the merits of a proposal to control the burden on the courts, it simply cannot form any basis for an injunction arrogating to the federal courts the discretion properly vested in prison officials.

preparation of written guides for use of the library; credentials for a law librarian; strict selection and retention criteria for trained legal assistants; and minimum times and durations of telephone calls to attorneys. *Id.* at 1272-1283.

It appears that the entire basis for the Court of Appeals' affirmance of the district court's order is that the provisions of that order are required to provide meaningful access to courts under *Bounds*. It is not clear from the opinion whether the Court of Appeals has determined that each and every aspect of the district court's order is required to provide meaningful access under *Bounds* or whether the Court of Appeals determined that once a court finds that inmates have been denied access to courts it is free to choose whatever remedy will most easily maximize access. This Court should grant certiorari to clarify that the components of a legal access system ordered by the lower courts are not required by *Bounds*. This Court should also clarify that even a violation of prisoners' right of access to courts does not divest prison officials of all discretion to develop and implement an adequate system of access.



CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, the Petition should be granted.

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April 13, 1995

AUG 14 1995

IN THE
Supreme Court of the United States

CLERK

OCTOBER TERM, 1995

SAMUEL LEWIS, *et al.*,
v. *Petitioners,*

FLETCHER CASEY, JR., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
(PHOENIX)

Docket No. 90-CV-54

CASEY, *et al.*

v.

LEWIS, *et al.*

RELEVANT DOCKET ENTRIES

DATE	No.	PROCEEDINGS
3/28/91	126	AMENDED COMPLAINT by plaintiffs (by stip) [1-1] (ce) [Edit date 03/28/91] * * *
4/26/91	175	MOTION for partial summary judgment by defendant [175-1] (jh) [Entry date 05/02/91]
4/26/91	176	MEMORANDUM of P&As IN SUPPORT by defendant motion for partial summary judgment by defendant [175-1] (jh) [Entry date 05/02/91]
4/26/91	177	STATEMENT OF FACTS by defendant re motion for partial summary judgment by defendant [175-1] [175-1] (jh) [Entry date 05/02/91]
4/26/91	178	AFFIDAVIT of Gail A Parin (jh) [Entry date 05/02/91]
4/26/91	179	AFFIDAVIT of J. C. Keeney (jh) [Entry date 05/02/91] * * *

DATE	No.	PROCEEDINGS
5/13/91	191	MOTION for partial summary judgment by defendant [191-1] (ce) [Entry date 05/15/91]
5/13/91	192	STATEMENT OF FACTS by defendant re motion for partial summary judgment by defendant [191]. (ce) [Entry date 05/15/91]
5/13/91	193	MEMORANDUM p/a by defendant re [191]. (ce) [Entry date 05/15/91] * * * *
5/13/91	195	AFFIDAVIT of J.C. Keeney (ce) [Entry date 05/15/91]
5/13/91	196	AFFIDAVIT of Gail Parin (ce) [Entry date 05/15/91] * * * *
5/30/91	210	RESPONSE by plaintiffs and Class to motion for partial summary judgment by defendant [191.]. (ce) [Entry date 05/31/91]
5/30/91	211	STATEMENT OF FACTS by plaintiff in re to dfts s/j mtn [210-1] (ce) [Entry date 05/31/91] * * * *
6/14/91	220	REPLY by defendant to response to motion for partial summary judgment by defendant [191-1] (ce) [Entry date 06/17/91]
6/14/91	221	STATEMENT OF FACTS defendant insuprt of motion reply [220]. (ce) [Entry date 06/17/91] * * * *
6/27/91	226	ORDER by Judge C.A. Muecke denying motion for partial summary judgment by defendant [191-1] (cc: all counsel) (ce) * * * *

DATE	No.	PROCEEDINGS
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9/16/91	245	MEMORANDUM by defendant re [244-1] (ce) [Entry date 09/18/91] * * * *
9/23/91	254	RESPONSE by plaintiff to motion in limine by defendants (to exclude inmate grievances and inmate kites at trial) [244-1] (ce) [Entry date 09/24/91] * * * *
9/30/91	263	REPLY by defendant to response to motion in limine by defendants (to exclude inmate grievances and inmate kites at trial) [244-1] (ce) [Entry date 10/10/91] * * * *
10/21/91	267	ORDER by Judge C A. Muecke 1) granting motion in limine by plaintiffs to exclude cert specified evidence [246-1] 2) granting in part and den in part motion in limine by defendants (to exclude inmate grievances and inmate kites at trial) [244-1] [see doc for full details] (cc: all counsel) (ce) * * * *
11/15/91	291	STIPULATION of facts by ptys cnsl as a result of Alhambra, ACW, ASP-Douglas, ASP-Florence, ASP-Tucson, ASP-Perryville & ASP-Winslow tour. (ce) [Entry date 11/19/91] * * * *
12/6/91	299	Court Reporter's Transcript of Proceedings for the following date(s): 11/22/91, (ce)

DATE	No.	PROCEEDINGS
1/2/92	319	Court Reporter's Transcript of Bench Trial Proceedings for the following date(s): 12/17/91 (ce) [Entry date 01/03/92]
1/2/92	320	Court Reporter's Transcript of Bench Trial Proceedings for the following date(s): 12/18/91, (ce) [Entry date 01/03/92]
1/2/92	321	Court Reporter's Transcript of Bench Trial Proceedings for the following date(s): 12/19/91, (ce) [Entry date 01/03/92] * * * *
1/15/92	325	Court Reporter's Transcript of Proceedings for the following date(s): 1/7/92 (jh) [Entry date 01/16/92]
1/15/92	326	Court Reporter's Transcript of Proceedings for the following date(s): 1/8/92(jh) [Entry date 01/16/92]
1/15/92	327	Court Reporter's Transcript of Proceedings for the following date(s): 1/9/92 (jh) [Entry date 01/16/92] * * * *
1/22/92	329	Court Reporter's Transcript of Proceedings for the following date(s): 1/14/92 (jh) [Entry date 01/27/92]
1/22/92	330	Court Reporter's Transcript of Proceedings for the following date(s): 1/15/92 (jh) [Entry date 01/27/92]
1/22/92	331	Court Reporter's Transcript of Proceedings for the following date(s): 1/16/92 (jh) [Entry date 01/27/92] * * * *
2/7/92	335	Court Reporter's Transcript of Proceedings for the following date(s): 1/27/92 (jh) [Entry date 02/11/92] * * * *

DATE	No.	PROCEEDINGS
5/29/92	360	PROPOSED FINDINGS OF FACT and conclusions of law subtd by dfts. (ce) [Entry date 06/01/92] [Edit date 06/02/92] * * * *
5/29/92	362	PROPOSED FINDINGS OF FACT and conclusions of law submitted by pltf's. (ce) [Entry date 06/02/92] [Edit date 06/02/92] * * * *
8/14/92	366	REPLY by pla to dfts findings of fact [360-1] (ce)
8/14/92	367	RESPONSE by dft to pltf's findings of fact [362-1] (ce) [Entry date 08/17/92] * * * *
11/16/92	385	FINDINGS OF FACT and conclusions of law-Access to the Courts by Judge C A. Muecke (cc: all counsel) (cn)
11/25/92	386	ORDER by Judge C A. Muecke appointing Daniel J Pochoda as Special Master & Janet Bliss as Asst Special Master, see ord for further details (cc: all counsel) (re: order [386-1] (cn) * * * *
12/17/92	389	NOTICE OF APPEAL by dft from District Court [385-1] (cc: 9CCA/All Counsel) (dl) [Entry date 12/21/92] * * * *
12/18/92	388	MOTION for a stay of its order dated 11/20/92 by dfts in 2:90-cv-00054 [388-1] (cn) [Entry date 12/21/92]
12/30/92	390	MOTION for accelerated disposition of motion for a stay of its order dated 11/20/92 by dfts in 2:90-cv-00054 [388-1] (cn) [Entry date 12/31/92]

DATE	No.	PROCEEDINGS
12/31/92	391	SUPPLEMENT to dfts' mtn to stay by dfts in 2:90-cv-00054 (cn) [Entry date 01/04/93]
1/8/93	392	Pltf's opposition in 2:90-cv-00054 to motion for a stay of its order dated 11/20/92 by dfts in 2:90-cv-00054 [388-1] (cn)
1/12/93	393	SUPPLEMENT to dfts' mtn to stay [388-1] in 2:90-cv-00054 (cn) [Entry date 01/15/93]
		* * * *
1/22/93	395	DFTS' OBJECTIONS to implementation of the Gluth injunction in particular facilities in 2:90-cv-00054 (cn) [Entry date 01/25/93]
		* * * *
2/5/93	396	ORDER by Judge C A. Muecke: Spec Mastr & Asst Spec Mastr monitor case w/i confines of monitoring Casey v Lewis, 90-54; consistent w/11/20/92 ord in 90-54, Asst Spec Mastr s/b pd \$65 p/hr; clk of crt file attchd ltr frm Spec Mastr into CV-84-1626; clk of crt file cy of this ord into CV-90-54 (cc: all counsel) (re: order [396-1] (jh)
		* * * *
2/9/93	398	SECOND MOTION to accelerate disposition of motion for a stay of its order dated 11/20/92 by dfts [388-1] (mp) [Entry date 02/12/93]
		* * * *
2/19/93	400	Dfts' additional objections/modifications to implementation of the Gluth injunction to particular facilities (cn) [Entry date 02/22/93]
		* * * *
3/19/93	405	OBJECTIONS by dfts to plas' proposed modifications to Gluth order [386-1] (cn) [Entry date 03/22/93]
		* * * *

DATE	No.	PROCEEDINGS
4/28/93	419	DFTS' ADD'L OBJECTIONS to plas' proposed modifications (cn) [Entry date 04/29/93]
		* * * *
5/10/93	429	ORDER by Judge C A. Muecke the Spec Mstr & Asst Spec Mstr sh investigate to determine whether dfts hv directed employees not to speak to the Spec Mstr or Asst Spec Mstr in their investigation of the access to the crts issues in this case and/or the Gluth case & whether dfts hv fired the employee in retaliation for speaking to the Asst Spec Mstr; Spec Mstr & Asst Spec Mstr sh hv all of the authority already ord in addition they sh hv the authority to conduct hrgs & subpoena & question witnesses under oath including employees of the ADOC; they sh also make recommendations as to whether, if allegations are true, dfts hv violated Crt's previous ords, including ords setting forth the authority & duties of Spec Mstr & Asst Spec Mstr; they sh also make recommendations as to whether, if allegations are true, what sanction(s) and/or action(s) are appropriate, including, contempt proceedings & reinstatement of the employee allegedly discharged in retaliation (cc: all consl) (re: order [429-1] (cn)
		* * * *
5/18/93	431	ORDER by Judge C A. Muecke IT IS ORD that the Spec Mstr is directed to report his findings on a) were any of the negative actions involving the Florence law librarian materially attributable to either his cooperating w/the Spec Mstr's ofc or his attempts to comply w/the Gluth final perm injunc, b) have dfts made a good faith effort to comply w/Section I(G) of the Gluth final

DATE	No.	PROCEEDINGS
		perm injunc c) have dfts seriously interfered w/the Spec Mstr's direct access to ADOC personnel & prisoners as required by the Gluth & Casey orders; after the Spec Mstr has made these findings, the Crt will consider what, if any, sanctions & actions are required (cc: all counsel) (re: order [431-1] (cn)
5/24/93	432	PLAS' RESPONSE to dfts' objections dated 4/28/93 (add'l objections to the modification & implementation of the Gluth order) [419-1] (cn)
5/24/93	433	MOTION to disqualify special master by dft [433-1] (cn) [Entry date 05/25/93]
5/24/93	434	DFTS' MEMORANDUM IN SUPPORT of motion to disqualify special master [433-1] (cn) [Entry date 05/25/93]
		* * * *
5/26/93	436	ORDER by Judge C A. Muecke granting motion for expedited disposition by dfts (re: mtn to disqualify) [435-1], denying motion to disqualify special master by dft [433-1] (cc: all counsel) (cn)
5/28/93	437	ORDER by Judge C A. Muecke RE: I. Procedure for objections to billing of Special Master & II. Clarification of particular objections allowed and the role of the Special Master III. (cc: all counsel) (re: order [437-1] (cn)
		* * * *
5/28/93	439	ORDER by Judge C A. Muecke denying motion for a stay of its order dated 11/20/92 by dfts [388-1] (cc: all counsel) (cn)
		* * * *

DATE	No.	PROCEEDINGS
8/13/93	450	Dfts' objections to the Special Master's proposed order (cn) [Entry date 08/16/93]
9/7/93	451	MOTION dismsis dfts' objections dated 8/13/93 by pla in 2:90-cv-00054 [451-1] (cn) [Entry date 09/09/93]
9/7/93	452	MEMORANDUM of points and authorities in support of mtn to dismiss dfts' objections dated 8/13/93 [451-1] (cn) [Entry date 09/09/93]
9/13/93	453	DFTS' RESPONSE to motion dismiss dfts' objections dated 8/13/93 by pla [451-1] (cn) [Entry date 09/14/93]
9/13/93	454	MEMORANDUM of Points and Authorities in support of dfts' response to plas' mtn to dismiss dfts' objections to the Special Master's proposed order by dfts [453-1] (cn) [Entry date 09/14/93]
9/22/93	455	PLAS' REPLY to response to motion dismiss dfts' objections dated 8/13/93 by pla in 2:90-cv-00054 [451-1] (cn) [Entry date 09/24/93]
		* * * *
9/29/93	459	ORDER by Judge C A. Muecke denying motion dismiss dfts' objections dated 8/13/93 by pla [451-1]; however, in his preparation of the final injunction, the Special Master has the discretion to disregard any objections or claims that were made for the first time in the final objections filed on 8/13/93 and any objections that are not supported by the evidence (cc: all counsel) (cn)
		* * * *
10/13/93	463	ORDER by Judge C A. Muecke that the permanent injunction, as proposed by the Special Master, is adopted by the Court (cc: all counsel) (re: order [463-1] (cn)

DATE	No.	PROCEEDINGS
10/13/93	464	PERMANENT INJUNCTION ACCESS TO THE COURTS ISSUES by Judge C A. Muecke re: Law Libraries, Legal Assistance Program, Legal Svcs & Supplies, Indigent Prisoners, Implementation (see 28 pg perm injunction & order appendices for further details) (cc: all counsel) (re: permanent injunction [464-1] (cn)
10/20/93	465	ORDER by Judge C A. Muecke status hearing set for 12/10/93 at 10:00 (cc: all counsel) (cn)
10/29/93	466	ORDER by Judge C A. Muecke dfts shall maintain on file in each law library within the ADOC sufficient copies of the permanent injunction [464-1] to allow the inmates to examine the injunction. Any inmate who requests to see a copy of the injunction shall be allowed to examine the injunction. (cc: all counsel) (cn) * * * *
11/22/93	474	MOTION to stay order of 10/13/93 by dfts [474-1] (cn) [Entry date 11/23/93] [2:90 cv54]
11/22/93	475	MOTION for accelerated disposition of motion to stay order of 10/13/93 by dfts [474-1] (cn) [Entry date 11/23/93] [2:90cv54] * * * *
12/7/93	479	ORDER by Judge C A. Muecke the Clerk of the Court shall file the Report and attachments submitted by the Asst Special Master & send copies of the Report to counsel for the plas and dfts in this action. In addition to the mental health care issue, counsel for the parties should be prepared to discuss the violations of the access to the courts Injunction at the Status Conference scheduled for

DATE	No.	PROCEEDINGS
		12/10/93. Dfts are advised that continued violations will result in contempt of court. (cc: all counsel) (re: order [479-1] (cn) [2:90cv54]
12/7/93	480	MEMORANDUM & attachments submitted by Asst Special Master Janet Bliss (ordered filed by Order [479-1] of 12/7/93 (cn) [2:90cv54]
12/8/93	481	RESPONSE by pla to motion to stay order of 10/13/93 by dfts [474-1] (cn) [2:90cv 54] * * * *
12/14/93	488	ORDER by Judge C A. Muecke (re: permanent injunction [464-1] dfts shall file monthly written reports with the court setting forth what they have done to comply with the permanent injunction; first report due no later than 1/31/94, each subsequent report shall be filed on the last day of the month, copies to be sent to opposing cnsl and office of Special Master status report due 1/31/94 (cc: all counsel) (seal) [Entry date 12/15/93] [2:90cv54] * * * *
12/23/93	492	ORDER by Judge C A. Muecke that no later than 1/20/94 parties shall file written memoranda setting forth their position RE: scope of the access to the courts injunction in CASEY relevant to the Central Unit of Florence, which is under the GLUTH injunction (cc: all counsel) (re: order [492-1] (mm) [Entry date 12/27/93] [2:90cv54] * * * *
1/6/94	495	ORDER by Judge C A. Muecke that any intentional failure by dfts to comply with Order concerning the powers of the Office of Special Master will be considered con-

DATE	No.	PROCEEDINGS
		tempt of court & is subject to immediate hearing & possible sanctions. (cc: all counsel) (re: order [495-1] (cn) [2:90cv54])
		* * * *
1/14/94	497	ORDER by Judge C A. Muecke denying motion to stay order of 10/13/93 by dfts [474-1] (cc: all counsel) (cn) [2:90cv54]
		* * * *
1/20/94	500	MEMORANDUM regarding application of Casey v. Lewis legal access order to the central unit by dfts (all) (sb) [Entry date 01/24/94] [2:90cv54]
		* * * *
1/31/94	501	STATUS REPORT by dft's (all) regarding implementation of legal access injunction (sb) [Entry date 02/01/94] [2:90cv54]
2/8/94	502	ORDER by Judge C A. Muecke that the Special Master shall examine the doc of dfts' survey and investigate all of the units to determine the accuracy; report setting forth the assessment of the Special Master due 2/28/94; if hearings are necessary, the Special Master will probably conduct the hearings the week of 3/28/94 . . . see doc for full details (cc: all counsel) (sb) [2:90cv54]
2/9/94	503	AMENDED STATUS REPORT by dft regarding implementation of legal access injunction (sb) [Entry date 02/10/94] [2:90cv54]
2/9/94	504	MOTION for reconsideration by dfts [504-1], for clarification by dfts [504-2] (sb) [Entry date 02/10/94] [2:90cv54]
2/9/94	505	MEMORANDUM IN SUPPORT by dfts of motion for reconsideration by dfts [504-1], motion for clarification by dfts [504-2] (sb) [Entry date 02/10/94] [2:90cv54]

DATE	No.	PROCEEDINGS
2/11/94	506	ORDER by Judge C A. Muecke that no later than 2/16/94 this order shall be posted in a clearly visible manner in each ADOC law library. The Special Master shall check on this posting and shall mail or deliver both of these orders to relevant ADOC personnel [sic] including librarians. This order shall remain posted in each ADOC law library within the state (cc: all counsel) (re: order [506-1] (sb) [2:90cv54])
2/11/94	507	ORDER by Judge C A. Muecke that NLT 2/18/94 dfts shall provide the Special Master's Office all of the info and items requested; the 2/28/94 compliance status report shall include copies of the revised DMO's and DMP's covering all the areas or mandates mentioned in the final permanent inj; NLT 2/18/94 the dfts shall provide the Ass Special Master with current computer listings of the names of inmates confined in each unit covered by the Casey order . . . see doc for details (cc: all counsel) (re: order [507-1] (sb) [2:90cv54])
2/15/94	508	SUPPLEMENTAL ORDER by Judge C A. Muecke that dfts shall provide the above DMO's and DMP's for the February report and each future monthly report on computer disk to the Office of Special Master . . . see doc for full details (cc: all counsel) (re: order [508-1] (sb) [2:90cv54])
		* * * *
2/28/94	512	STATUS REPORT regarding implementation of legal access injunction by dfts (sb) [Entry date 03/01/94] [2:90cv54]
		* * * *
3/3/94	514	ORDER by Judge C A. Muecke that the Assistant Special Master deliver the typewriter

DATE	No.	PROCEEDINGS
		to the appropriate unit. The ADOC shall not deny inmates typewriters allowed under the permanent injunction (cc: all counsel) (re: order [514-1] (sb) [2:90cv54]
3/7/94	515	ORDER by Judge C A. Meucke that dfts and employees of the dfts appear before the Special Master during the week of 3/28/94 to show cause why they should not be held in contempt for their failure to comply with any provisions of the permanent injunction. The Special Master shall submit Findings of Fact to this court NLT 4/20/94 setting forth specifically what the dfts have done to comply with each provision of the permanent injunction . . . see doc for full details (cc: all counsel) (re: order [515-1] (sb) [2:90cv54]
		* * * *
3/18/94	519	ORDER by Judge C A. Muecke (re clarification of Gluth permanent injunction) (cc: all counsel) (re: order [519-1] (la) [2:90cv54]
		* * * *
3/18/94	521	COMPLIANCE REPORT by Assistant Special Master (sb) [Entry date 03/21/94] [2:90cv54]
3/18/94	522	EXHIBITS to Compliance Report by Assistant Special Master (Re: [521-1] 1-34) (sb) [Entry date 03/21/94] [2:90cv54]
3/18/94	523	EXHIBITS to Compliance Report by Assistant Special Master (Re: [521-1] 35-94) (sb) [Entry date 03/21/94] [2:90cv54]
		* * * *
3/25/94	526	ORDER by Judge C A. Muecke clarifying the authority of the Office of the Special Master to hire additional professionals [sic] to carry out duties of the Office of the Special Master (cc: all counsel) (re: order [526-1] (sb) [2:90cv54]

DATE	No.	PROCEEDINGS
3/25/94	527	ORDER by Judge C A. Muecke denying motion for reconsideration by dfts [504-1], granting, to the limited extent set forth in the order, motion for clarification by dfts [504-2] (cc: all counsel) (sb) [2:90cv54]
		* * * *
3/31/94	530	REPORT by all dfts rearding implementation of leal access injunction (sb) [Entry date 04/04/94] [2:90cv54]
6/7/94	548	TRANSCRIPT of status hearing by Court Reporter: Vicki Reger for the following date(s): 5/5/94 (sb)
		* * * *
4/3/95	583	ORDER by Judge C A. Muecke that nlt 4/12/95 the dfts may challenge any of the fees of the Special Master to this adte based on the standard set forth. For any fees challenged, dfts must file a memo of p/a; as soon, as the stay is lifted in this case the Special Master shl investigate and file his findings re: the proper indigence standard; as soon as the stay is lifted in this case the Special Master shl investigate and file his findings re: the cost of photocopies to the dft (cc: all counsel) re: order [583-1] (mp) [2:90cv54]
		* * * *
4/24/95	595	OBJECTIONS by all dfts to special master fees (order [583-1]) (sb) [Entry date 04/25/95] [2:90cv54]
4/24/95	596	MEMORANDUM by all dfts in support of objection to Special Master fees [595-1] (sb) [Entry date 04/25/95] [2:90cv54]
		* * * *
5/2/95	600	OBJECTIONS by all dfts to Court's order of April 3, 1995 referring additional duties

DATE	No.	PROCEEDINGS
		to the special master [583-1] (sb) [Entry date 05/08/95] [2:90cv54]
5/2/95	601	MEMORANDUM by all dfts in support of dft's objections to Court's April 3, 1995 order referring additional duties to the special master [600-1] (sb) [Entry date 05/08/95] [2:90cv54]
5/3/95	599	ORDER by Judge C A. Muecke denying motion to clarify by all dfts [594-1]; Special Master shall have until 6/15/95 to respond to defts objections; Special Master and Ass Special Master shall be reimbursed for the time spent responding to dfts objections (cc: all counsel) (sb) [2:90cv54]
		* * * *
5/30/95	611	ORDER by Judge C A. Muecke; although the 9CCA has remanded some issues regarding access to the courts, the Supreme Court has granted review of the access to the courts portion of the case on a writ of certiorari; therefore, it appears that the Supreme Court stay remains effective and this court will not act on those matters remanded by the 9CCA, including the challenge to the Special Master's fees, until the Supreme Court renders its decision or until a higher court directs this court otherwise re: appeal [470-1] (cc: all counsel/9CCA) (rew) [2:90cv54]
		* * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-17169

CASEY, *et al.*

v.

LEWIS, *et al.*

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * *
3/14/94	Filed Appellant Samuel A. Lewis emergency motion to stay the Injunctive Order of the District Court pending final outcome of this appeal; served on 3/11/94 (CIVATT) (tm)
3/16/94	Filed Appellant Samuel A. Lewis's motion to file oversized brief; served on 3/15/94 (CIVATT) [93-17169] (tm) [Entry date 03/21/94]
3/18/94	Filed Appellee Fletcher Charles Casey response; served on 3/17/94 (CIVATT) [93-17169] (tm)
3/21/94	Received Appellees' two corrected pages of appellees' Response to Emergency Motion to Stay; served 03/18/94 (CIVATT) [93-17169] (tm) [Entry date 03/23/94]
3/22/94	Filed Appellant Samuel A. Lewis reply to response to emergency motion for stay; served on 3/21/94 (CIVATT) [93-17169] (tm)
3/25/94	Filed order (Betty B. FLETCHER, Stephen S. TROTT): Appellants' emergency motion to stay implementation of the d.c.'s 10/13/93 order is

DATE	PROCEEDINGS
	denied. Appellants' motion to exceed the page limit of the brief is granted in part. Appellants' opening [sic] brief, not to exceed 45 pages, is due 04/04/94. Appellees' brief is due 05/05/94. The optional reply brief is due 14 days from service of appellees' brief. (Atys' telephoned at 11:15 am) (tm) [Edit date 03/25/94]
4/6/94	Filed Original and 15 copies Appellant Samuel A. Lewis opening brief (Informal: n) 445 pages and five excerpts of record in 1 volumes; served on 4/4/94 [93-17169] (tm)
	* * *
4/25/94	Filed copy of certified Supreme Court order granting a temporary stay of the injunctive order issued 10/13/93. (SC Date: 4/18/94) [93-17169] (crw)
	* * *
5/6/94	Filed Supreme Court order (SC Date: 5/2/94) The application for stay of enforcement of the injunctive order of the USDC/Arizona issued 10/13/93, is granted pending timely filing and disposition by SC of a petition for cert. Should the petition for cert. be denied, this stay terminates automatically. If petition for cert. is granted this stay shall continue pending sending down of judgment of SC. See casefile for full wording. [93-17169] (mlm) [Entry date 05/10/94]
	* * *
6/9/94	Filed original and 15 copies Appellee Fletcher Charles Casey brief, 45 pages, 1 Exc. vols: served on 6/8/94 minor defcy: statement of related cases, Notified counsel regarding concerns regarding footnotes (FRAP 32) [93-17169] (tm) [Entry date 06/15/94]
6/16/94	Received Appellee Fletcher Charles Casey satisfaction of (minor) brief deficiency (Statement of Related Cases) [93-17169] (tm)
	* * *

DATE	PROCEEDINGS
7/7/94	Filed original and 15 copies Samuel A. Lewis reply brief, (Informal: n) 21 pages; served on 7/6/94 [93-17169] (tm)
7/31/94	Arizona prison officials appeal the dc's order, in a 42 U.S.C. sec 1983 class action, finding that prisoners were unconstitutionally denied meaningful access to the courts and issuing a permanent injunction imposing on the Arizona Dept. of Corrections a legal access plan.
	ISSUES:
	1. Did the dc err in concluding that prison officials unconstitutionally denied inmates their right of access to the courts because all the following were constitutionally adequate:
	a. the contents and access to libraries;
	b. access to courts of illiterate of non-English speaking prisoners;
	c. library staffing;
	d. legal assistance;
	e. indigency standard;
	f. photocopying [sic] policy?
	g. telephone call policy?
	2. Did the dc abuse its discretion in awarding injunctive relief beyond the parameters set forth in Bounds v. Smith 430 U.S. 817 (1977)?
	3. Did the defendants fail to preserve their objections to the form of remedy?
	4. Did the dc err in requiring defendants, without opportunity, for objection to pay all expenses of the special master who designed the legal access plan?
	NOTES: *In Casey v. Lewis, 91-16513, 4 F.3d 1516 (9th Cir. 1993), this court reversed the dc's summary judgment in favor of plaintiffs on issues

DATE	PROCEEDINGS
	of contact visitation and whether HIV-positive inmates could hold food-service position. *The dc's ruling that defendants unconstitutionally denied plaintiffs meaningful access to the courts is published at 835 F. Supp. 1553 (D. Ariz. 1992). *Prior companion appeals: 93-16313, 93-15883, and 91-16683 (procedurally terminated); and 93-15039 (dismissed-lack of jurisdiction). *On 5/6/94, the U.S. Supreme Court stayed enforcement of the dc's order. wt = 7 Atty: H. Goldberg Date: 7/8/94 [93-17169] (rk) [Edit date 08/19/94]
9/17/94	CALENDARED: SAN FRAN Nov 16 1994 9:00 am Courtroom 2 [93-17169] (aw)
11/16/94	ARGUED AND SUBMITTED To Donald P. Lay, Harry PREGERSON, Diarmuid F. O'SCANNLAIN [93:17169] (dl) * * *
11/16/94	Proposed disposition circulated by HP to dpl, DFO. [93-17169] [NOTE: this is NOT public information] (fb) [Entry date 03/08/95]
11/17/94	Filed order (Donald P. Lay, Harry PREGERSON, Diarmuid F. O'SCANNLAIN): At oral argument, the parties expressed a willingness to use the services of this Court's settlement program. To enable the parties to arrive at a settlement, the Court will defer submission of this matter for thirty days. If the parties still wish to mediate their differences, they should call David Lombardi, Chief Circuit Mediator, at 744-9907, before noon on Tuesday, Nov. 22, 1994. The parties shall then meet w/the Court Mediator in S.F. beginning on Monday, Nov. 28, 1994. To facilitate settlement, Dan Pachoda, the District Court's Special Master,

DATE	PROCEEDINGS
	and Samuel Lewis, the Director of the Arizona Department of Corrections, shall attend [sic] the settlement proceedings. The parties shall remain in S.F. and work with the Court Mediator until they have arrived at a settlement or until the Court Mediator declares an impasse. If by Dec. 23, 1994, the parties have not reached an agreement, or if the Court Mediator declares an impasse, submission of this matter shall no longer be deferred. (Counsel notified by telephone) [93-17169] (dl)
11/23/94	Case resubmitted on this date to Donald P. Lay, Harry PREGERSON, Diarmuid F. O'SCANNLAIN. (See previous deferral of submission.) Order filed: 11/28/94. [93-17169] (tm) [Entry date 11/28/94] * * *
12/27/94	FILED OPINION: (Terminated on the Merits after Oral Hearing; affirmed in part, and VACATE and REMAND in part; Written, Signed, Published. Donald P. Lay; HARRY PREGERSON, author; Diarmuid F. O'SCANNLAIN.) FILED AND ENTERED JUDGMENT. [93-17169] (dl)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No: CIV 90-0054 PHX CAM

FLETCHER CASEY, JR., STEPHEN JAMES, FRANK BARTHOLIC, ARMANDO MUNOZ, KYLE BAPTISTO, DAVID A. MANN, JEFFREY LUSTIG, TERRY DON MCFALLS, RANDY SAMPSON, JOHN TOMLIN, SCOTT TRAMPOSCH, PAMELA MCQUILLEN, CAROLYN FERGUSON, YVONNE MARTIN, DAVID TUCKER, SUSAN COLKER, JOHN MYERS, MARY JO BOOKER, RANDY THOMAS, RUTH JOHNSON, ROMAN STONE, ROBERT BANKSTON, *et al.*,
on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

SAMUEL A. LEWIS, Director, Arizona Department of Corrections; ROBERT GOLDSMITH, Arizona State Prison Complex, Florence; WARDEN WILLIAM RHODE, Arizona State Prison Complex, Perryville; WARDEN GEORGE HERMAN, Arizona State Prison Complex, Douglas; WARDEN ROGER CRIST, Arizona State Prison Complex, Tucson; WARDEN HAL CARDIN, Arizona State Prison Complex, Phoenix,

Defendants.

PRELIMINARY STATEMENT

1. This class action complaint, filed on behalf of all adult prisoners who are or will be incarcerated by the State of Arizona Department of Corrections, alleges that defendants are deliberately indifferent to prisoners' serious medical needs; that prisoners are assigned to and retained in segregation on the basis of uncorroborated, confidential information, including allegations of gang activity, thereby denying prisoners due process; that defendants have denied prisoners meaningful access to the courts and counsel; that defendants have failed to accommodate that special needs of handicapped prisoners; and that defendants have denied female prisoners the equal protection of the

laws. Plaintiffs allege that these acts and omissions by defendants subject prisoners to needless and serious suffering.

JURISDICTION

2. This civil action seeking declaratory and injunctive relief is brought pursuant to § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, as amended by the Civil Rights Restoration Act of 1987; and 42 U.S.C. § 1983, in that plaintiffs have been and continue to be deprived of their rights secured by the United States Constitution under the First, Sixth, Eighth and Fourteenth Amendments.

3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1343 (3), and 2201.

VENUE

4. Venue is proper under 28 U.S.C. § 1391 (a), in that defendants reside in the State of Arizona, and plaintiffs' claims for relief arise in the State of Arizona.

PARTIES

5. Plaintiffs are prisoners currently assigned to prison facilities in the State of Arizona.

6. Fletcher Casey, Jr. is a prisoner currently assigned to the Special Management Unit in Florence, Arizona. He was assigned to segregation within the Special Management Unit based on uncorroborated confidential information alleging gang activity. In addition, since August 1989, he has not received recommended specialized medical attention for a chronic knee ailment.

7. Frank Bartholic is a prisoner currently assigned to the Special Management Unit in Florence, Arizona. He waited three months to see a doctor for a painful back ailment. In addition, this functionally illiterate prisoner had no one to assist him with his initial pleadings in a lawsuit he filed, which was subsequently dismissed with prejudice.

8. Armando Munoz is a prisoner currently assigned to the Special Management Unit in Florence, Arizona. In November 1988, he was assigned to segregation within the Special Management Unit based on uncorroborated confidential information alleging gang activity. In addition this prisoner has been waiting twelve months to see a dentist for a painful gum condition.

9. Kyle Baptisto is a prisoner currently assigned to the Special Management Unit in Florence, Arizona. He has been subjected routinely to interference with access to the courts including interference with his receipt of legal mail.

10. Roman Stone is a blind prisoner currently assigned to the Special Management Unit in Florence, Arizona. The defendants have failed to accommodate the special needs required by his blindness.

11. Stephen James is a prisoner currently assigned to Cellblock 6 in Florence, Arizona. Due to the shortages of staff, he has been required to choose between use of the law library and eating meals. He has complained to health care providers about painful lumps on his back but they have not been evaluated by a physician.

12. Terry Don McFalls is a prisoner currently assigned to Cellblock 6 in Florence, Arizona. He suffers from folliculitis. Although prison staff know of his medical condition, he has been repeatedly forcibly shaved and not provided an alternative way of removing facial hair.

13. David Mann is a prisoner currently assigned to the East Unit in Florence, Arizona. He has been denied specialized treatment for a potentially life threatening heart ailment.

14. David Tucker is a prisoner currently assigned to the East Unit in Florence, Arizona. He has been denied medically necessary follow-up for a serious health condition.

15. Jeffrey Lustig is a prisoner currently assigned to the South Unit in Florence, Arizona. While at Central Facility in Florence, he complained to health care providers of chest pains for two months before being seen by a doctor.

16. John Myers is a prisoner currently assigned to the Central Unit in Florence, Arizona. He waited five months to see a dentist for a painful tooth with an exposed nerve.

17. John Tomlin is a prisoner currently assigned to the North Unit in Florence, Arizona. He was transferred to the North Unit from the Mohave Unit in Douglas, Arizona in December 1989. When assigned to the Mohave Unit he waited eight months to be seen by an orthopedist for a painful knee condition.

18. Pamela McQuillen is a prisoner currently assigned to the Women's Prison in Florence, Arizona. She waited five days before being taken to the hospital for treatment of a painful skin condition.

19. Carolyn Ferguson is a prisoner currently assigned to the Women's Prison in Florence, Arizona. She has been denied treatment for hypertension.

20. Yvonne Martin is a prisoner currently assigned to the Women's Prison in Florence, Arizona. She has been denied appropriate medication for a serious asthmatic condition.

21. Randy Sampson is a prisoner currently assigned to the Perryville-San Pedro Unit in Goodyear, Arizona. He has been denied sufficient library access to prepare his legal pleadings.

22. Mary Jo Booker is a prisoner currently assigned to the Perryville-Santa Maria Unit in Goodyear, Arizona. She waited four years to see a doctor for a herniated disc. While in segregation for six months, she was unable to obtain legal materials and to confer with a legal assistant.

23. Randy Thomas is a prisoner currently assigned to the Perryville-Santa Cruz Unit in Goodyear, Arizona. He waited four months to see a dentist for a toothache.

24. Robert Bankston is currently assigned to Gila Unit in Douglas, Arizona. For one month he was denied any medical attention for a stomach ulcer after coughing up blood and complaining of stomach cramps. He was refused legal materials for sixty-two (62) days while housed in disciplinary segregation.

25. Scott Tramosch is a prisoner currently assigned to the Rincon Unit in Tucson, Arizona. In order to use the satellite law library while on lockdown status, he was handcuffed to a waist chain, severely restricting his use of legal materials. He was denied direct access to the main law library.

26. Susan Colker is a prisoner currently assigned to the Arizona Center for Women in Phoenix, Arizona. She represents herself in civil actions and is unable to research the law thoroughly due to inadequate books and legal assistance.

27. Ruth Johnson is a prisoner currently assigned to the Arizona Center for Women in Phoenix, Arizona. She has serious medical needs that have gone untreated, causing her pain and general discomfort.

28. Defendants are agents, officials, or employees of the State of Arizona Department of Corrections.

29. Defendant Sam Lewis is the Director of the Arizona Department of Corrections. In the capacity of director he is responsible for the administration and application of DOC statewide policies, and is ultimately responsible for the operation of all the prison facilities, including decisions concerning staff deployment and training that directly affect plaintiffs' abilities to obtain medical care, access to the courts and counsel, and the process.

30. Warden Robert Goldsmith is responsible for the day-to-day operation of the Arizona State Prison Complex

in Florence, Arizona. In the capacity of warden he is responsible for the daily operation of this entire complex, including the Women's Prison, East Unit, Special Management Unit, Cellblock 6, and Central Unit.

31. Warden William Rhode is responsible for the day-to-day operation of the Arizona State Prison Complex-Perryville in Goodyear, Arizona. In the capacity of warden, he is responsible for the daily operation of this entire complex, including the San Pedro, Santa Cruz, San Juan, and Santa Maria Units.

32. Warden George Herman is responsible for the day-to-day operation of the Arizona State Prison Complex in Douglas, Arizona. In the capacity of warden, he is responsible for the daily operation of this entire complex, including the Gila Unit, Mohave Unit, Maricopa Unit, Cochise Unit, and Papago Unit.

33. Warden Roger Crist is responsible for the day-to-day operation of the Arizona State Prison Complex in Tucson, Arizona. In the capacity of warden, he is responsible for the daily operation of this entire complex, including the Santa Rita, Rincon, Cimarron, Tent, and Echo Units.

34. Warden Hal Cardin is responsible for the day-to-day operation of the Arizona State Prison Complex in Phoenix, Arizona. In the capacity of warden, he is responsible for the daily operation of this entire complex for women and men.

35. Defendants are sued individually and in their official capacities. At all relevant times, defendants have acted under color of State law.

CLASS ACTION ALLEGATIONS

36. This action is brought as a class action pursuant to Rule 23 (b) (2) of the Federal Rules of Civil Procedure.

37. Plaintiffs are representative parties of a class composed of all adult persons who are now or who in the future will be in the custody of or under the supervision of the State of Arizona Department of Corrections.

38. The class is so numerous that joinder of all members of the class is impractical. Current members of the class consist of more than 9,000 prisoners, and the prisoner population in each facility changes frequently.

39. Upon information and belief, conditions described in this complaint, are common to all prisoners within the Arizona State Prison system, the class that plaintiffs represent. The named representatives are subjected daily to the same deprivations of the class members as a whole.

40. Defendants' acts and omissions as set forth herein present questions of law common to the class members as a whole.

41. Claims made by the class representatives involve allegations of denials of constitutional rights that are generally applicable to the class as a whole.

42. Plaintiffs are members of the class and their claims are typical of all class members. Plaintiffs are represented by competent counsel who will fairly and accurately represent the interests of the class as a whole.

43. Since the class number is more than 9,000 prisoners, separate actions by individuals would in all likelihood result in inconsistent and varying decisions, which in turn would result in conflicting and incompatible standards of conduct for the defendants.

44. The defendants have acted or have refused to act on grounds generally applicable to the class, thereby making final injunctive and declaratory relief with respect to the class as a whole appropriate.

A. LACK OF MEDICAL CARE

45. Defendants do not provide immediate evaluations or diagnoses of prisoners' serious medical complaints.

Defendants misdiagnose serious medical complaints, resulting in significant and unnecessary suffering and even death. For instance, at the women's facility in Florence, a woman prisoner, complaining of serious chest pains, was initially diagnosed as having indigestion, and later died, purportedly from heart failure.

46. No physician regularly provides medical care at the women's facilities. On weekends and evenings security staff at some of these facilities are involved in the decision to have a woman's medical complaints evaluated by a health care provider.

47. Plaintiffs experience unreasonable delays in receiving medical care. For example, at the Special Management Unit (SMU), prisoners may wait from three to four weeks to be seen by a physician for a serious medical complaint.

48. Prisoners are frequently required to choose between sick call and other rights such as eating meals, law library access and exercise.

49. Sick call at some facilities is held two times per week or less. For example at Central Unit, sick call is frequently cancelled on one of the two days scheduled. Consequently, prisoners with serious medical needs are not evaluated. Sick call is held for prisoners in lockdown frequently less than once a week.

50. At the South Unit in Florence, prisoners must stand in line outdoors for sick call, regardless of the weather. The health care provider evaluates the prisoners by talking to them while they are standing in this line through a window, in the presence of other prisoners and security staff. The confidentiality attendant to health care delivery is not only seriously breached but the ability to perform an adequate health care assessment is severely compromised.

51. Physician's assistants often preempt medical care prescribed by a physician. For example, a hospital physi-

cian told a prisoner in CB6 that he had a hole in his ear, but the physician's assistant instead claimed that the hole did not exist, and refused to provide the recommended treatment.

52. The failure to have sufficient staff, both security and health care, has resulted in prisoners' treatment being delayed or terminated. For instance, at the CB6 facility, prisoners have been taken off psychotropic medication without first being seen by a psychiatrist.

53. Prisoners are given diets that do not conform to their minimum nutritional needs.

54. Plaintiffs' mental health needs are frequently ignored. Women with serious mental health needs who cannot function in the general population but do not meet the State's statutory requirements for commitment are placed in isolation cells, frequently for extended periods of time, at the Women's facilities in Perryville and Florence. A prisoner, placed in isolation at Perryville because she was considered a mental health case, constantly complained of cramps. She was refused attention by the CMA, and subsequently, she was discovered to have given birth. At the Douglas facility, prisoners are not provided any mental health services.

55. Pregnant intravenous drug users are routinely isolated at the Women's Perryville facility, and subsequently, all medical attention is seriously delayed.

56. Prisoners experience unreasonable delays in receiving dental care. For example, at the Douglas facility, a prisoner with a painful gum condition waited for five months to see a dentist.

57. At the Women's Perryville facility, prisoners have access to other prisoners' confidential medical information.

58. The allegations contained in paragraphs (45) through (57) constitute defendants' deliberate indifference to prisoners serious medical needs.

B. DISCRIMINATION AGAINST HANDICAPPED PRISONERS

59. A blind prisoner in the SMU is not provided the necessary legal assistance, compounding the access problems experienced by prisoners classified as I-5.

60. Prisoners with HIV disease are discriminated against in some facilities in the provision of programming.

61. In some facilities, handicapped prisoners are denied access to bathrooms, showers, and other essential facilities due to the absence of handrails, bars, and other mobility aids.

62. The Arizona Department of Corrections receives Federal financial assistance.

63. The allegations contained in paragraphs 59 through (62) constitute defendants' discrimination against handicapped prisoners as otherwise qualified handicapped individuals.

C. LEGAL ACCESS

64. Defendants do not provide persons trained in the law or attorneys to assist prisoners, even those who are illiterate or non-English speaking, in pursuing legal actions.

65. In most facilities, prisoners are not allowed to make legal calls unless a letter is first submitted giving permission for the telephone call from the prisoner. Prisoners therefore must frequently use monitored telephones to make legal calls. Even when privileged legal calls are allowed, they are frequently unreasonably delayed.

66. In most facilities, plaintiffs must first provide a case number before being able to talk to a prisoner legal assistant about a legal problem. Prisoners may also be asked to describe the problem for which they want legal

assistance. In some facilities, prisoners are not provided privacy for these meetings.

67. In some institutions prisoners are not allowed to copy their own legal materials. They must give these materials to prison staff to photocopy, compromising confidentiality.

68. At the South and East Units, prisoners have direct access to the law library, but are not allowed to browse the shelves. They have no starter volumes to aid them in their research, and no legal assistance. They must request a book from an untrained prisoner or staff person.

69. At CB6 defendants frequently require prisoners to choose either law library, sick call, or outdoor exercise; prisoners' legal mail is frequently opened outside the presence of prisoners; and, their confidential legal memos from prison legal assistants are routinely read by defendants' staff.

70. At the SMU prisoners classified as I-5 are denied physical access to the law library by being put into cages. These prisoners are required to have untrained officers or other prisoners classified as I-3 obtain their legal materials.

71. Prisoners in the SMU are denied contact attorney visits, unnecessarily infringing on their rights to access to the courts and counsel and confidentiality of legal materials. These prisoners are unable to review documents simultaneously with their attorneys and documents that consist of more than a few pages must be given to officers to pass between attorney and prisoner. The officers are out of view of the attorney and prisoner when delivering documents from one to the other.

72. Prisoners are harmed by the denial of meaningful access to the courts. For example, at the SMU an illiterate prisoner had his *pro se* case dismissed because defendants did not provide him with any legal assistance beyond indirect access to law books.

73. Defendants provide some facilities with only a satellite law library. The satellite law library provides insufficient legal materials. Prisoners must request basic legal materials from other law libraries. They frequently experience delays, and occasionally are unable to receive needed legal materials.

74. At the Douglas facility, prisoners who are in administrative segregation or disciplinary segregation have no direct law library access. Prisoners must know the exact full citation of a case in order to receive the law book. A prisoner may be in administrative or disciplinary segregation for as long as three months.

75. At the Tucson facility, administrative segregation prisoners are hand-cuffed to a waist chain while using the law library.

76. The allegations contained in paragraphs (64) through (75) constitute a denial of meaningful access to the courts and counsel.

D. FAILURE TO PROVIDE DUE PROCESS

77. Defendants regularly assign prisoners to and retain prisoners in segregation on the basis of uncorroborated, confidential information, including unsubstantiated claims of prisoner gang activity from other prisoners and staff. Prisoners are unable to question or confront any persons making these claims and, therefore, cannot contest a decision assigning them to segregation once it has been made.

CAUSE(S) OF ACTION

78. With respect to each and every following cause of action, allegations contained in paragraphs (1) through (77).

79. Defendants' acts and omissions at each of their facilities constitute deliberate indifference to plaintiffs' serious medical needs, violating the Eighth Amendment's prohibition against cruel and unusual punishment.

80. Defendants, by their acts and omissions, are depriving plaintiffs of their rights of access to the courts and counsel protected by the First, Sixth, and Fourteenth Amendments.

81. Defendants' arbitrary procedures for assigning prisoners to segregation violate their Due Process rights under the Fourteenth Amendment.

82. The failure of defendants to accommodate handicapped prisoners' special needs discriminates against these prisoners in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, as amended by the Civil Rights Restoration Act of 1987.

83. Defendants' acts and omissions in providing to female prisoners health care that is inferior to that provided male prisoners denies female prisoners the equal protection of the laws in violation of the Fourteenth Amendment.

VIII. PRAYER FOR RELIEF

84. Plaintiffs and the class they represent have no adequate remedy at law to redress the wrongs suffered as set forth in this complaint. Plaintiffs have suffered and will continue to suffer irreparable injury as a result of the unlawful acts, omissions, policies, and practices of the defendants as alleged herein, unless plaintiffs are granted the relief they request. The need for relief is critical because the rights at issue are paramount under the Constitution of the United States.

85. WHEREFORE, plaintiffs, on behalf of themselves and the class they represent, request that this Court grant them the following relief:

(a) certify the class of all adult prisoners who are now or who will be in the future under the custody of or under the supervision of the State of Arizona Department of Corrections;

(b) adjudge and declare that the acts, omissions, policies, and practices of the defendants violate the First, Sixth, Eighth, and Fourteenth Amendments, which grant constitutional protection to plaintiffs and the class that plaintiffs represent;

(c) order defendants, their agents, officials, employees, and all persons acting in concert with them under color of State law or otherwise, to provide needed health care for plaintiffs; to provide meaningful access to the courts; to accommodate the special needs of handicapped prisoners; to cease assigning prisoners to segregation based on uncorroborated, confidential information; and to cease denying female prisoners the equal protection of the laws;

(d) enjoin defendants, their agents, officials, employees, and all persons acting in concert with them under color of State law or otherwise, from continuing the unconstitutional acts, conditions, and practices described in this Complaint, and from failing to provide in the future constitutionally adequate medical care, access to the courts and counsel, accommodations for the special needs of handicapped prisoners, due process in segregation assignments, and equal protection of the laws for female prisoners;

(e) retain jurisdiction in this case until the unlawful and unconstitutional conditions and practices as alleged herein no longer exist and the Court is satisfied that they will no longer occur;

(f) grant plaintiffs the costs and expenses of maintaining this action, including reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and,

(g) grant any other relief that the Court deems just and proper.

Respectfully submitted,

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Dated: March 25, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

(Title Omitted in Printing)

STIPULATION

The parties' attorneys toured Alhambra, ACW and the Arizona State Prison Complexes in Florence, Tucson, Douglas, Perryville and Winslow the week of August 19, 1991. As a result of this tour¹ they stipulate to the following facts.

I. ACCESS TO THE COURTS

A. Law Library Schedule, Inventories and Capacities.

All the law libraries toured contained the "Muecke list", although some of the law library inventories were not current. Any specific problems in the inventories are outlined below by facility. Most of the law libraries had a copy of the *Prisoners' Self-Help Litigation Manual* and the Warden in Winslow agreed to purchase it. Many of the law libraries had legal volumes in addition to those required by the Muecke list. Most of the law libraries contained an inventory list, but this list was not posted in all law libraries.

1. ASPC—Florence, Cellblock Six (CB-6).

a. On August 20, 1991, CB-6 housed approximately 180 prisoners.

¹ Attorneys for Defendants advised Plaintiffs' counsel that Defendants were no longer intending to use the socialization chair at the Special Program Unit. That stipulation is included at the end of this document.

b. The law library is open Monday through Sunday from 7:00 a.m. to 10:00 p.m. The law library may close prior to 10:00 p.m. if the list of prisoners requesting use of the facilities is exhausted.

c. On or about July 20, 1991, the seating capacity in the law library was changed from one to four prisoners by the construction of cages within the law library area.

d. Prisoners cannot browse the shelves. A prisoner law clerk hands prisoners the requested legal materials.

e. There are four to six two-hour call-outs per day. A prisoner may be able to stay longer than two hours if he requests additional time. Prisoners with court deadlines are given priority.

f. The weekly bulletin containing the list of approved legal assistants is posted on the law library bulletin board.

g. The Muecke list was current on August 20, 1991, with the exception of missing pocket parts from some *Corpus Juris Secundum* volumes as noted by Plaintiffs' counsel. Counsel for Defendants did not note these missing pocket parts.

h. The law library contains legal books exceeding the Muecke list, including the following volumes: *How To Use Shepards*; *How To Find The Law*; *Prisoners Self-Help Litigation Manual*, 1983 edition but not the 1990 update; and *Post Conviction* manuals, current edition.

2. ASPC—Florence, Special Management Unit (SMU).

a. There were approximately 90 I-3 prisoners housed in SMU and 822 I-5's on August 20, 1991.

b. I-3's are allowed to use the law library from 6:00 p.m. to 8:00 p.m., Tuesday through Saturday. I-5's are allowed to use the law library from 7:00 a.m.-3:00 p.m., Monday; 7:00 a.m.-9:00 p.m., Tuesday-Friday; and, 1:00 p.m. to 9:00 p.m., Saturday.

c. A prisoner may use the law library for three hours per call-out. If he has a court deadline, he is given as much time as possible.

d. There is a three to four day wait after a request to use the law library is made. Preference is given to prisoners with a court deadline. When the list of prisoners requesting library time is exhausted, the library staff calls for prisoners off the next day's schedule.

e. Prisoners do not have direct access to the shelves. I-5 prisoners sit in individual locked cages adjacent to the law library and receive legal materials from either the prisoner law clerk or the officer assigned to the law library. I-3 prisoners sit in the general seating area at tables and request materials from the prisoner or civilian library staff.

f. The law library inventory contains legal books exceeding the Muecke list, including the following volumes: *How To Use Shepards*; *How To Find The Law*; *Prisoners' Self-Help Litigation Manual*, 1983 edition; and *Post Conviction* manuals, current edition.

3. ASPC—Florence, Women's Division.

a. The Women's Division is a medium security institution.

b. The law library is open Monday and Friday from 8:00 a.m. to 3:30 p.m.; Tuesday and Wednesday from 10:00 a.m. to 6:00 p.m.; and, Thursday from 8:00 a.m. to 3:00 p.m. The law clerks are attempting to get permission to change the hours to 8-3, 5-7:30, Monday through Friday. Access is occasionally permitted beyond the posted hours.

c. There are 190 women incarcerated in this unit. The seating capacity of the law library is approximately 24-25. Between 5 and 10 women use the facility daily.

d. Prisoners have direct access to shelves. Arrangements can be made for lockdown prisoners to have physi-

cal access to the law library, however, material is also taken to prisoners in lockdown by the law clerk/legal assistant.

e. The law library complies with the Muecke list and contains legal books exceeding that list, including the following volumes: *Nutshells on Legal Research*; *ACLU Rights of Prisoners*, and *Prisoners' Self-Help Litigation Manual*, 1983 edition.

f. A list of legal assistants is available in the law library.

4. ASPC—Florence, East Unit.

a. East Unit is a medium security institution.

b. The law library is operational Monday through Friday from 10:00 a.m. to 6:00 p.m. The law library is closed from 3:00 p.m. to 4:00 p.m. for count.

c. There are 430 prisoners in this unit. The seating capacity of the law library is 16. Approximately six prisoners use the law library per hour.

d. Prisoners have direct access to the shelves for some reference books.

e. Lockdown prisoners do not have direct physical access to the law library. They must request legal materials through a paging system.

f. An inventory list is present in the law library.

g. A list of approved legal assistants is present in the law library.

h. The library inventory contains legal books exceeding the Muecke list including, but not limited to, the following volumes: the 1983 edition of *Prisoner's Self-Help Litigation Manual* and *Self-Help Guide to Rule 32*, written by a law clerk.

5. ASPC—Florence, North Unit.

a. North Unit is a level 2, minimum security facility.

b. The law library is open Monday and Friday from 8:00 a.m. to 3:30 p.m. and Tuesday through Thursday from 10:30 a.m. to 6:30 p.m. There are no weekend hours. Most prisoners work so more people use the law library during the evening hours.

c. There are 391 prisoners assigned to this unit. The seating capacity of the law library is 16-18. Approximately eight prisoners use the law library each day.

d. Prisoners must request some legal materials from a law clerk.

e. Prisoners on "house arrest" have physical access to the law library upon request to the Captain.

f. The law book inventory list is present in the law library, but is not posted.

g. A list of approved legal assistants is not posted in the law library. The Correctional Security Officer in the library maintains the list.

h. The law library satisfies the Muecke list and contains the following additional volumes: *How To Use The Law Library*, by Ruse; *Prisoners' Self-Help Litigation Manual*, 1983 edition; *Prisoners' Self-Help Post Conviction Manual*, 1988 edition.

6. ASPC—Florence, South Unit.

a. The South Unit is a level 3, medium security institution.

b. The law library is open Tuesday through Saturday from 7:00 a.m. to 3:00 p.m., and is crowded on Saturdays.

c. There are 409 prisoners in this unit. The law library seating capacity is eight to twelve. Approximately

four to five prisoners use the law library daily. Approximately once every two weeks there are too many prisoners for the law library and these extra prisoners are seated in the lending library.

d. Prisoners do not have direct access to the shelves in the law library. Instead, prisoners must request needed material from a law clerk or ADC security officer.

e. Prisoners who are housed in the Special Program Unit (SPU) are scheduled for access to the law library on Wednesdays and Fridays from 12:00 noon to 2:30 p.m. They may get permission to come on other days or remain in the law library for a longer period of time.

f. A law library inventory list is present, but not posted in the law library.

g. There is no list of approved legal assistants posted in the law library. The officer assigned to the law library maintains the list and will make it available to prisoners upon request.

h. The law library inventory complies with the Muecke list. The law library does not contain the *Prisoner's Self-Help Litigation Manual* or *Post Conviction Manual*.

7. Alhambra.

a. Alhambra is a reception and diagnostic facility and a mental health facility which houses approximately 372 prisoners. It is classified as a maximum security facility. Prisoners in the reception and diagnostic component stay approximately two weeks.

b. The seating capacity of the law library is eight.

c. Prisoners do not have direct access to the shelves. Instead, they must request material through a law clerk.

d. The law library is open from 7:30 a.m. to 8:30 p.m., Monday through Friday and 8:00 a.m. to 10:00 p.m., Saturday and Sunday. Prisoners are scheduled by

unit and get between 7½ hours and 10 hours in the law library per week.

e. The law book inventory list was not present in the law library on the day of the tour. According to Warden Upchurch, placing the law book inventory list in the law library would not present a problem.

f. The law library inventory satisfies the Muecke list, however, some of the law library volumes were not complete. There was no *Shepard's U.S. Citations* 1991 supplement and the *Federal Reporter*, second edition went only to Volume 935.

g. The law library contains volumes exceeding the Muecke list, including *How To Do Legal Research; A Simplified System of Citation*, and *Jailhouse Lawyer's Manual*.

8. ASPC—Douglas: Mohave Unit and Gila Unit.

a. Mohave is a level 3, medium security facility, with 872 prisoners. Gila is a level 2, minimum security facility with 632 prisoners. Since March or April 1991, the law libraries have been operational Monday through Friday from [12:00 Gila] 1:00 p.m. to 3:30 p.m. and 5:00 p.m. to 9:00 p.m.; Saturday and Sunday from 8:00 a.m. to 10:30 a.m. and 12:30 p.m. to 3:30 p.m. Prior to March 1991, the law library hours were 6:00 p.m. to 9:00 p.m. [8:00 Gila] Monday through Friday. The Mohave law library is also used by prisoners at the Papago DWI facility. The staff at Douglas obtained approval for the new hours as an exception to the March 15, 1991, ADC policy based on their assessment of law library usage.

b. On weekends, photocopying and notary services are not available.

c. The seating capacity of the Mohave law library is approximately 28. Approximately 15 prisoners use this law library per day. The seating capacity for the Gila

law library is 24 and approximately 9 prisoners use this law library daily.

d. Lockdown prisoners are not allowed physical access to the law library. They must use a paging system for requesting legal materials.

e. General population prisoners have direct access to shelves.

f. An inventory list is placed on the bulletin board in the law library.

g. Legal assistance forms are in the policy books in the law library. The law clerks copy them for prisoners upon request.

h. A two-hour tape by West Publishing Company, purchased in 1991, on how to use the law library books is available in the law libraries. It has been shown on the prison television channel at least twice in 1991.

i. The law libraries satisfy the Muecke list. The inventories contain volumes exceeding the Muecke list and include the *Prisoners' Self-Help Litigation Manual*, 1983 edition.

9. ASPC—Winslow, Kaibab Unit.

a. Kaibab is a medium security facility.

b. The law library is open Monday through Friday from 7:00 a.m. to 9:00 p.m. This schedule was approved as an exception to ADC policy based on a study of prisoner usage.

c. There are 716 prisoners assigned to this unit. There are two law library call-outs per day.

d. A prisoner usually receives at least ten hours per week in the law library. If a prisoner has a court date an attempt is made to give him as many hours as needed. A prisoner may wait as long as three days to get into the law library.

e. Prisoners do not have direct access to the shelves.

f. Lockdown prisoners do not have physical access to the law library. They may request materials through a paging system or request legal assistance in writing.

g. The law library contains a two-hour tape on legal research entitled *Legal Research Made Easy*, by Nolo Press. The tape comes with a guide which was missing from the law library. Law clerks and legal assistants are not required to review the tape.

h. The law library inventory list is posted in the law library and is posted in the lockdown unit and in the living areas.

i. The law library contains volumes exceeding the Muecke list including the *Prisoners' Self-Help Litigation Manual*, 1983 ed. and 1990 update.

10. ASPC—Winslow, Coronado Unit.

a. Coronado is a minimum security facility.

b. The law library is open Monday, Tuesday, Wednesday, and Friday from 1:00 p.m. to 4:00 p.m. and 4:30 p.m. to 9:00 p.m.; Thursday from 1:00 p.m. to 3:30 p.m. and 6:30 p.m. to 9:00 p.m.; and, Saturday from 9:00 a.m. to 11:00 a.m.

c. There are 600 prisoners assigned to this facility. Prisoners can attend the law library any time during the hours of operation. According to staff's usage study, an average of nine prisoners used the law library per day on weekdays, and two prisoners per Saturday.

d. The seating capacity of the law library is approximately 30.

e. Prisoners, including legal assistants, do not have direct access to the shelves. They must request materials from the law clerk.

f. The inventory list of approved legal assistants is not posted in the law library.

g. The law library inventory satisfies and exceeds the Muecke list. The warden indicated his intention to order *Prisoners' Self-Help Litigation Manual*. The Warden also agreed to purchase the *Post Conviction Manual* and *Legal Research in a Nutshell* if these volumes were not already available.

11. ASPC—Perryville, San Juan Unit.

a. San Juan is a medium security facility.

b. The law library is open from 1:00 p.m. to 9:00 p.m. Monday through Thursday and 8:00 a.m. to 4:00 p.m., Friday. The Captain indicated that he will open the law library on weekends if the prisoner has a court deadline.

c. Lockdown prisoners may make a written request to come to the law library. Only one prisoner can come at a time.

d. There are 744 prisoners in this unit. The law library seating capacity is 18. The officer allows 12 prisoners and three law clerks to be in the law library.

e. Prisoners do not have direct access to the shelves.

f. The law library inventory list is present but not posted in the law library.

g. There is no list posted of approved legal assistants in the law library.

h. The legal assistance forms are not in the law library.

i. The librarian is ordering *Black's Law Dictionary* and making arrangements to place copies of the *Appellate Handbook* in each law library.

j. The law library contains volumes exceeding the Muecke list including the 1983 edition of *Prisoners' Self-Help Litigation Manual*.

12. ASPC—Perryville, Santa Cruz Unit.

a. The law library is operational Monday through Thursday 1:00 p.m. to 9:00 p.m. and Friday from 8:00 a.m. to 4:00 p.m. The law library is open on weekends in the afternoon if prisoners write and indicate a need to work. There is no direct access to the shelves.

b. There are 744 prisoners assigned to this unit. The seating capacity is twelve. Prisoners need a pass to go to the law library, but can come and go whenever the law library is open.

c. Lockdown prisoners do not have physical access to the law library. Lockdown prisoners receive their legal materials through a paging system. When a lockdown prisoner is unsure of the materials he needs, the index of the digest is sent to him.

d. The law book inventory list is present in the law library.

e. The list of approved legal assistants is on file in the law library, but not posted.

f. The law library does not keep legal assistance forms.

g. The law library does not have volumes 32-38 of the *Modern Federal Practice Digest* which is on the Muecke list.

h. The law library contains legal books not on the Muecke list including the 1983 edition of *Prisoners' Self-Help Litigation Manual* and the current edition of *Self-Help Post Conviction Manual*.

13. ASPC—Perryville, Santa Maria Unit.

a. Santa Maria is a maximum security facility. There are 302 women prisoners housed in this unit.

b. The law library is open from 8:00 a.m. to 8:00 p.m., Monday through Friday. The day is divided into

four, two and one-half hour sessions. Prisoners get a maximum of ten hours per week in the law library unless they have a court deadline.

c. The law library is periodically closed because of staff shortages. Attempts are made to make up lost hours of operation.

d. Prisoners who are in investigative lockdown cannot go to the law library. These prisoners request legal materials through a paging system.

e. Prisoners do not have direct access to shelves.

f. A law look inventory list is present but not posted in the law library.

g. The law library does not have the *Modern Federal Practice Digest* which is on the Muecke list.

h. The law library inventory contains legal volumes not on the Muecke list.

14. *ASPC—Perryville, San Pedro.*

a. Four hundred thirty-two prisoners were assigned in this unit on the date toured.

b. The law library is open Monday through Friday from 7:00 a.m. to 11:00 a.m., 2:00 p.m. to 4:00 p.m. and 6:00 p.m. to 8:00 p.m. If an officer is available and there is no problem with visitation, the law library is open the same hours on Saturday and Sunday.

c. The seating capacity of the law library is fifteen.

d. Photocopies take one to two days.

e. Prisoners in lockdown do not have physical access to the law library. They must request legal materials through a paging system.

f. A law library inventory list is posted in the law library.

g. The law library does not have a complete set of Arizona legal forms. The librarian has this legal material on order.

h. The law library inventory satisfies the Muecke list. The law library also contains legal volumes not on the Muecke list including *Prisoners' Self-Help Litigation Manual* and the 1988 edition of *Post Conviction Manual*.

15. *Arizona Center for Women (ACW)—Phoenix.*

a. ACW houses minimum security prisoners. The population was approximately 350 on the day toured. The seating capacity of the law library is 20. Between 4 and 10 prisoners use the law library per day.

b. Prisoners have direct access to books. There have been no problems with missing books or torn pages.

c. Prisoners in lockdown are allowed physical access to the law library upon request.

d. The law library is open from 1:00 p.m. to 9:00 p.m., Monday through Friday.

e. The Muecke list is posted in the law library, but not the entire law library inventory.

f. Pocket parts in several volumes of *Federal Practice Digest*, third edition, are not current. The pocket part for *Arizona Law of Evidence (UDALL)* is not current. The staff indicated they have ordered the missing pocketparts.

g. The law library inventory includes legal volumes in addition to those on the Muecke list.

B. *Legal Assistants And Law Library Staff.*

Most law libraries were staffed by a security staff member and varying numbers of prisoner law clerks. Law libraries at SMU, Perryville, Tucson, Winslow and Doug-

las were also staffed by a civilian librarian. There is no ADC training program for inmate clerks. Some of the prisoner law clerks have taken a correspondence paralegal course on their own initiative. There is no requirement that they have any legal training, although at Perryville and Tucson the librarians require law clerks to pass a test.

All the facilities utilized legal assistants who provided legal help to prisoners who needed or requested it. Legal assistants were also utilized in most facilities to service prisoners in lockdown.

1. *ASPC—Florence, CB-6.*

a. As of August 20, 1991, CB-6 had four approved prisoner law clerks, of whom one spoke Spanish as well as English.

b. One security officer and one prisoner law clerk are present in the law library when it is operational.

c. The approved list of legal assistants is placed in the weekly bulletin. On August 2, 1991, there were three approved legal assistants.

d. Legal assistance forms are not present in the law library.

e. A prisoner law clerk conducted a training program in legal research for approximately three months. This program was discontinued in 1990.

2. *ASPC—Florence, SMU.*

a. The SMU has three law clerks.

b. One Correctional Security Officer, at least one law clerk and a librarian are present during the hours of operation.

c. The approved list of legal assistants is placed in the weekly bulletin. There were eleven approved legal assistants on the list as of April 20, 1991.

d. Legal assistance forms are not present in the law library.

3. *ASPC—Florence, Women's Division.*

a. There is no civilian staff person assigned to the law library.

b. There are two approved prisoner law clerks who staff the law library. There is always at least one law clerk in the law library when it is open.

c. The two approved law clerks are also approved legal assistants. Neither speak Spanish. There are a number of Spanish-speaking prisoners. The law clerks either use a Spanish/English dictionary or attempt to find someone on the yard to interpret.

d. There are three additional legal assistants who only handle disciplinarys.

4. *ASPC—Florence, East Unit.*

a. The law library is staffed by a Correctional Security Officer and two law clerks. There are three law clerk positions.

b. There are seven approved legal assistants.

c. One legal assistant speaks some Spanish.

5. *ASPC—Florence, North Unit.*

a. A Correctional Security Officer and two law clerks staff the law library. The prisoner who does the photocopying is Latino and speaks Spanish fluently.

b. There was one approved legal assistant at the time of the tour.

6. *ASPC—Florence, South Unit.*

a. The law library staff includes a Correctional Security Officer and three prisoner law clerks, one of whom speaks Spanish.

b. The Spanish-speaking law clerk also is an approved legal assistant. There are nine approved legal assistants.

7. *Alhambra.*

a. The law library is staffed by two approved prisoner law clerks. They also serve as the approved legal assistants.

b. The law library has neither a civilian librarian or civilian librarian assistant.

c. Legal assistance request forms are not present in the law library.

d. The prisoner law clerk photocopies legal materials.

e. All Correctional Program Officers are notaries.

8. *ASPC—Douglas Mohave Unit.*

a. The law library has three prisoner law clerks. One of the law clerks speaks Spanish. There is also a civilian librarian.

b. The facility also has approved legal assistants. The law clerks receive requests from prisoners in lockdown for material but cannot take the material to the prisoner. Only a legal assistant can take lockdown prisoners the requested material.

9. *ASPC—Winslow, Kaibab Unit.*

a. There are three law clerks, one of whom is bilingual, and a civilian librarian who staff the law library.

b. There are five legal assistants, but only two are approved to deliver legal materials to the lockdown unit. None of the legal assistants are bilingual.

c. Prisoner disciplinary representatives began receiving training in handling disciplinary cases in 1991. Two training sessions, similar to that given ADC staff, had been held by the date of the tour.

d. The procedures of disciplinary court are available to prisoners in English and Spanish.

10. *ASPC—Winslow, Coronado Unit.*

a. There are two approved law clerks and a civilian librarian staff for the law library. One law clerk is Spanish speaking. A circulation clerk in the general library speaks Navajo.

b. There are four legal assistants, one of whom may speak some Spanish.

11. *ASPC—Perryville, San Juan Unit.*

a. There are three law clerks, a Correctional Security Officer and a librarian assigned to the law library. This librarian is supervised by a person responsible for the general and law libraries. The librarian oversees the four law libraries at ASPC-Perryville. Two of the law clerks are Spanish speaking.

b. There are two law clerks assigned to assist prisoners who are in protective segregation. Neither of these law clerks speaks Spanish.

12. *ASPC—Perryville, Santa Cruz Unit.*

a. The law library staff includes a Correctional Security Officer, two law clerks and one bilingual aide in training.

b. The bilingual aide does not work on weekends.

13. *ASPC—Santa Maria Unit.*

a. The law library is staffed by three prisoner law clerks and a Correctional Security Officer. The law clerk who speaks Spanish was leaving the facility. One of the officers assigned to the law library speaks Spanish.

b. There is one approved legal assistant for general population prisoners and one for those in lockdown. Neither one of these legal assistants speaks Spanish.

14. *ASPC—Perryville, San Pedro.*

a. The law library is staffed with three law clerks and a Correctional Security Office. None of the law clerks speaks Spanish.

b. There are two approved legal assistants for this unit. The approved list is posted on the bulletin board in the yard.

15. *Arizona Center for Women (ACW)—Phoenix.*

a. The law library is staffed by two law clerks. An ADC employee who teaches at ACW also supervises the law library.

b. There were two approved legal assistants for disciplinary actions on August 19, 1991.

II. HANDICAP ACCESS.

The ADC has determined that only some facilities will be made accessible to prisoners with mobility impairment physical handicaps. These facilities are the Rincon Unit in ASPC—Tucson, and ASPC—Florence. ADC indicates it will not deny programming to prisoners based on a physical handicap, with the exception of its policy of denying HIV-positive prisoners job assignments in food service—the legality of which they plan to challenge on appeal. Plaintiffs and Defendants further stipulate that continued retrofitting of facilities for handicap access will be accomplished by retaining a consultant in architectural design from an independent organization with experience and expertise in handicap accessibility such as the Easter Seals Foundation. The following are the observations made during the tours the week of August 19, 1991 concerning aids to physically challenged prisoners.

A. *ASPC—Florence.*

1. *CB-6.*

a. The Health Unit is handicap accessible.

b. Showers and bathrooms are not handicap accessible. If a prisoner cannot use stairs, he can be housed in the observation cells.

c. The law library is handicap accessible.

2. *SMU.*

a. The Health Unit is handicap accessible.

b. The cells do not contain accommodations for the handicapped.

c. Handicapped prisoners who need baths are escorted to the health unit for their baths.

d. The law library is handicap accessible.

3. *Women's Division.*

a. The law library and program areas are handicap accessible.

b. One living unit is being renovated to be handicap accessible. The renovations are being made in accordance with recommendations from the Central Arizona Health Institute.

c. There was one woman in the facility who ambulated with a walker.

4. *East Unit.*

a. As of August 20, 1991, there were no wheelchair-bound prisoners in the facility.

b. The dining hall, law library, visitation area and hobby shop were made handicap accessible in 1990.

c. The Health Unit is handicap accessible.

d. Easy Cluster is utilized for wheelchair bound prisoners. The shower in Easy Cluster has a chair with

wheels, and a handrail. There is no anti-slip flooring. There is also a handrail in the bathroom.

- e. The lockdown unit is not handicap accessible.

5. North Unit.

- a. The Law Library is handicap accessible.
- b. There are some prisoners with prosthesis in this unit.

6. Rynning Unit.

This unit is not handicap accessible. Staff indicate handicapped prisoners are transferred to Central Unit.

7. South Unit.

- a. There were nine wheelchair-bound prisoners in this unit at the time of the tour.
- b. All living and program areas are on the ground floor and accessible to handicapped prisoners.
- c. A chair is placed in the shower. Prisoners must pull themselves up on a wall and lift themselves over a ledge to get into the shower and onto the chair.
- d. As of August 19, 1991, there were no handicap structures in the South Unit such as handrails, antislip flooring in the shower and bathroom areas and ramps. Plans exist, however, to make modifications to accommodate the physically handicapped.

8. Central Unit.

- a. In approximately February 1991, a plan was developed for handicapped access in Central Unit. This plan was to make modifications to Housing Unit 8.
- b. The modifications to Housing Unit 8 were scheduled to be completed in July 1991, however, there has been a six month delay.

- c. There are approximately 25-30 wheelchair-bound prisoners in the entire ASPC-Florence.

B. Alhambra.

1. ADOC staff consulted with the Easter Seals Foundation to determine how to accommodate physically handicapped prisoners.
2. The health unit is handicap accessible.
3. Showers are equipped with rails and a rubber tip chair. These improvements were made August 12, 1991.
4. Risers for toilet seats are on order.
5. The flooring for the bathrooms and showers is small tiles, but not anti-slip flooring.
6. Upper floors of Baker Ward and Flamenco are not handicap accessible.
7. One room for two prisoners in Baker Ward is equipped for the handicapped. The shower is handicap accessible and a riser for the toilet is on order. Two rooms in the reception unit are equipped for the handicapped.
8. The law library and occupational therapy area are handicap accessible.

C. ASPC—Douglas.

1. All shower floors are currently being provided anti-slip material (Rockite).
2. There are no handrails in the showers or toilet areas.
3. There are on occasion crutch-bound prisoners and prisoners with prosthesis at the facility.
4. The law libraries are handicap accessible.
5. Except for the administration building, all building are single level structures.

D. *ASPC—Winslow: Kaibab and Coronado.*

1. Prisoners with physical handicaps are not accepted to ASPC—Winslow.
2. All visiting and public areas are handicap accessible.
3. In general, the facility is not handicap accessible.
4. In September 1990, non-slip floors were put down inside and outside of the showers in the lockdown unit. When the prison was constructed in summer 1990, handrails in the showers and non-slip floors in the shower areas of the general population units.
5. The law libraries are handicap accessible.

E. *ASPC—Tucson.*

1. *Rincon—Unit.*

- a. Wheelchair-bound, crutch-bound and partially blind prisoners have been placed in Rincon.
- b. The bathrooms in the Rincon Unit have had anti-slip floors since 1981. There are no rails in the bathrooms and showers.
- c. All program units and living areas are on the ground floor and accessible to handicapped prisoners.

2. *Echo Unit.*

- a. This unit was not intended for handicap access.
- b. There is a ramp to the control unit and to the commissary. These ramps were constructed approximately two years ago.
- c. The shower in Dorm 3 was modified by putting anti-slip flooring and adding a handrail. A chair is available for handicap showering. These changes were made approximately three years ago due to the presence of a handicapped prisoner.

d. There are plans to modify Dorm 1 as Dorm 3 since there is a prisoner with a prosthesis assigned to Dorm 3. At the time of tour, the prisoner had to go from Dorm 1 to Dorm 3 to shower.

e. Prisoners are assigned to a housing unit before the unit staff know of any special needs. Once these needs are learned, the staff attempts to accommodate the handicapped prisoner.

3. *Santa Rita.*

a. One housing unit has a ramp to the cells and handrails in the shower. There was no anti-slip flooring in the shower. There was a wood platform in the shower. These accommodations to have existed approximately five years.

b. None of the cells had specialized toilets.

4. *Cimarron Unit.*

a. The dining area, barbershop, commissary, disciplinary hearing room and school are all on the first floor and accessible to handicapped prisoners.

b. The cellblock is two tiered and there is no ramp to the second tier.

c. ADC staff have purchased anti-slip strips for the shower area. There are no handrails in the showers or for the toilets.

d. The unit has had prisoners with prosthetics, however, staff indicate they will be transferred to Rincon Unit if they experience difficulties.

F. *ASPC—Perryville.*

1. There is no handicap access at the law libraries.
2. The health unit is on the ground level and is accessible. Wheelchair-bound prisoners are transferred out of the facility, however, there are prisoners who have

prosthesis and are physically challenged. Some of these prisoners are transported by electric cart and assisted into and out of the libraries.

3. Showers and bathrooms are not handicap accessible. ADC is committed to making 1 Pod handicap accessible and to assign prisoners there when appropriate. The women prisoners are a bigger problem than the men because they are a higher classification than allowed in ASPC—Florence Women's Unit.

4. The facility is looking at the possibility of installing handrails in showers and bathrooms and anti-slip flooring.

G. *Arizona Center for Women (ACW).*

1. The health unit and program areas, including the law library, are accessible to the handicapped.

2. There is one room with two double bunks that has been retrofitted with a handrail in the shower, toilet with handrail and anti-slip strips in shower. The floor around the shower was not anti-slip flooring.

III. CONFIDENTIAL INFORMATION.

In approximately January 1991 and April 1991, the facilities were provided with new policies on the use of confidential information in classification and disciplinary cases, respectively. A classification seminar was held in the spring or early summer 1991 to train staff in use of the forms attached to the policies. The policies require establishing the reliability of the informant and attempting to corroborate the information prior to taking any actions. Defendants agree that these policies will continue to remain in effect at all Arizona State Prison Complexes. In some of the facilities, security staff indicated they never relied upon confidential information for classification or disciplinary decisions, but if they ever had occasion to do so they would follow the 1991 policies. Other facilities indicated that they do not use confidential

information in the absence of corroborating physical proof. Some units using confidential information indicated that inmates are only locked down on confidential information where another inmate is at risk or where the security of the institution is threatened. The Central Office staff monitors the use of confidential information on those cases that are appealed to them. Only a small percentage of cases are appealed. Specific differences from this policy/procedure are noted below.

A. *ASPC—Florence.*

1. *SMU.*

This unit uses a form called the Contemporaneous Record Form, which is similar to the department's form contained in the 1991 procedure. The Contemporaneous Record Form was introduced in July 1991.

2. *East Unit.*

The unit used a narrative format for disciplinary reports that was supposed to contain information on the confidential informant. After the 1991 seminar, they began using the form for classification and disciplinary.

3. *North Unit.*

a. A form is not used to determine the reliability of confidential information when used in disciplinary cases. ADC staff was to have included similar information in their incident reports.

b. The reliability and credibility of information is based on the available physical evidence and what is said on the yard.

c. There have been six cases in the eight months prior to the tour relying on confidential information. Four of these cases were related to one assault.

d. Unit Staff will not take action solely on the basis of confidential information; corroborating physical evidence is required.

e. The Deputy Warden stated he would have no problem requiring his staff to complete the Department's confidential information forms.

4. *CB-6.*

The CB-6 staff indicated they did not utilize confidential information.

5. *Women's Unit.*

The Women's Unit staff indicated they did not utilize confidential information.

B. *ASPC—Winslow: Kaibab Unit.*

1. The staff at Kaibab Unit are provided training twice a year in use of confidential information.

2. Security staff have used the reliability forms since January 1991 or December 1990.

3. Security staff will not use confidential information in the absence of corroborating physical evidence.

C. *ASPC—Perryville.*

1. The facility started using the department form in April 1991. Prisoners are placed in lockdown immediately based on confidential information pending verification of the confidential information if the situation is life threatening or a major breach of security.

2. The form is filled out if the prisoner is facing a disciplinary or classification procedure in which confidential information will be used, even when physical evidence is found.

3. The credibility check on confidential information may take 30 days, but this is rare. When a prisoner is

locked down because the incident is life threatening or caused a major security breach, the credibility check takes approximately 11 days.

IV. SPECIAL PROGRAM UNIT.

The Defendants agree to no longer utilize the socialization chair that was located in this unit. The Defendants have removed that chair from the unit.

RESPECTFULLY SUBMITTED this 15th day of November 1991.

JONES, SKELTON AND HOCHULI

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(Title Omitted in Printing)

REPORTER'S TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE CARL A. MUECKE
UNITED STATES DISTRICT JUDGE
NOVEMBER 22, 1991

* * * *

[114]

DIRECT EXAMINATION
(Resumed)

BY MR. ADAMS:

Q: Mr. Wilbur, what use of law libraries do prisoners at the Arizona Department of Corrections have?

A: Generally most prisoners are unable to use the law library.

Q: Why is that?

A: There are a number of reasons. First of all, it goes without saying that most prisoners have not been trained in how to use law libraries. But even if they did have training, most of them do not, in my experience and from what I found in my tours and talking to people, just don't have either the intellectual ability. Sometimes they don't have the literacy levels that would be required to read law books and conduct legal research; some for reasons of English not [115] being their first language or not being a language that they understand at all. The law books are of no use to them.

And also in some of the institutions the prisoners, even if they don't have the problems I have just mentioned, are not actually allowed to see the books or get to the books themselves, and have to borrow them. Even if

they're in the law library they don't actually have direct access to the shelves in some situations. So there are a number of reasons why I found that to be true.

Q: Do you have an opinion on this level of use as it impacts on a prisoner's ability to access the courts?

MR. STRUCK: Objection, Your Honor, again I—

THE COURT: He's not testifying on constitutional access. He's talking about whether, in his opinion, based on his experience of knowing about what you do and prisons, and he's established as an expert. He can say a simple thing like whether or not you have access to the court. Whether that amounts to constitutional dimensions is another matter.

MR. STRUCK: Okay. May I make—

THE COURT: That's why I read that thing about the opinion. He's allowed to give opinions, for heaven sakes.

MR. STRUCK: Your Honor—

THE COURT: You can make any kind of a record you want. Go ahead.

* * * *

[122] BY MR. ADAMS:

Q: Mr. Wilbur, we're focusing on the ability of a prisoner to use the law library. Are there other categories of prisoners whose use of the law library is a problem in your—from your observation?

A: Okay. Well, in addition to the lawyers that are allowed to go to the library and who, as I've said, really don't have the ability to do that, to use it in any effective means or manner, there are a number of prisoners who are locked down and have no ability to actually get to the library in the first instance, and instead are forced to rely on what's often called a paging system of book borrowing.

Q: The parties have already stipulated to the fact that the persons who are in lockdown and that there is what is called a book borrowing system. Can you explain how the paging system or the book borrowing system works?

A: The details are somewhat different from one institution to another, but in general someone who does not have the physical ability to go to the law library requests in writing, by sending what's often called a kite or a written [123] request to the law library to borrow books.

THE COURT: By physical ability, you mean he is—the physical part of it is he's restricted by the prison itself, by the authorities there?

THE WITNESS: Yes, Your Honor, that's what I mean.

THE COURT: You don't mean handicapped?

THE WITNESS: No, I mean locked down.

THE COURT: Yeah. Okay.

THE WITNESS: Restrained from—not allowed to go there—

THE COURT: Right.

THE WITNESS: —by the prison authorities. They give a written request. Then if the book is there—okay. Where it varies is in some institutions you can request more than one book at a time, and that does vary. Then the book is delivered to the prisoner. The—if it's available and if they know what book the prisoner is asking for, and then the prisoner uses it for the allotted time and it's returned to the law library. That's the basic system.

BY MR. ADAMS:

Q: Why is that a problem?

A: It's a problem for a lot of reasons. Number one, some of the books aren't always available. Number two, a very common problem is that unless the prisoner is very, very specific in terms of what they want, they often are not given anything.

* * *

[152] * * * prisoner's ability to use the law libraries that you observed, for example with regard to staffing and the training of legal staff in the law library?

A: Yes, there are a couple—two particular problems. One is with regard to the assistance that is or is not available to prisoners at the law libraries themselves.

Q: And what is that?

A: Well, specifically that is the fact that the two classes of people that work in those libraries, staff—ADOC staff members that work in the law libraries and prisoner law clerks that work in the law libraries. That first of all, for both of those groups, they are prohibited by policy from assisting prisoners on their own legal matters. They can give general assistance with the library but they cannot actually assist on legal matters. And most of the prisoners need that assistance.

Secondly, there are—for those prisoners who are unable to get physical access to the law library, generally locked down prisoners, they are provided assistance pursuant to policy by these legal assistants, the people—the prisoner legal assistants. And those legal assistants are without training, without supervision, and generally are unable to provide any significant assistance, in my opinion.

* * *

[154] Also these prisoner paralegals need some training, need training in procedure, and how then once you know the law and once you know how to use a law library, you can actually find a way to get the claims that your clients might have heard by courts, or get your claims presented. So that would be things like, you know, rules of procedure and just procedures in general, and the various things that you have to do to get papers filed and to get them heard by a court.

Q: In your tours of the various facilities did you come across any problems associated with prisoners, legal assistants and law clerks not having sufficient training?

A: Yes. Universally I was told by prison staff members, by the librarian—or by the legal assistants—excuse me, themselves that there is no training program for prisoner legal assistance of any depth or substance in the state.

Q: Do prisoners ever—your testimony earlier was that you had interviewed numerous prisoners. Did that include legal assistants as well?

A: Yes, in a number of situations, yes, I did talk to a number of legal assistants. Yes.

Q: Were legal assistants experiencing problems giving persons assistance?

A: Yes.

Q: Why was that and what were the problems?

A: Well again, I had legal assistants who told me that they [155] didn't feel comfortable in helping other prisoners because they did not have sufficient training. That's the one issue. The other issue—another issue is that a number of them expressed to me the desire to have someone with more training than they had to be able to, in effect, critique their work or critique their ideas. Someone they could turn to for some guidance themselves, because they—there was no such person for them to go to that had the training that they didn't have.

MR. STRUCK: I'm—

MR. ADAMS: Would you please indicate specific—

MR. STRUCK: Sorry. I was going to move to strike.

THE COURT: Why?

MR. STRUCK: It's—that testimony was just as before, based on hearsay.

THE COURT: Yell, I've been thinking about all of this a little bit further and he could actually give opinions, for example, as to what he believes would be the appropriate way in which access to the courts ought to function based on his expertise and his prior experience.

* * * *

[164] Q: I would like to take us back to our discussion of law library inventories.

MR. ADAMS: And for the Court's benefit, Your Honor, there had been a discussion between myself and Mr. Wilbur on the specific question I had asked him earlier with regard to the Muecke list, and that defendants' counsel obviously was not privy to that discussion and there was no indication that Mr. Wilbur, prior to a week ago, would be bringing that opinion forward on the issue of augmenting the Muecke list.

However defense attorney was fully aware that the issue of self-help litigation manuals was a point that the plaintiffs' counsel was very much concerned about, and was part of our discussions when we formulated the stipulations.

* * * *

[169] Q: Do you have a recommendation of how this situation can be addressed?

A: That's difficult. Obviously you cannot let prisoners do their own photocopying and things. I think about the only thing you can do is have a very clear policy that it's against policy for prison officials or employees to read anything they're copying for the prisoners. They can obviously look at it to verify that it's a legal document and legal materials, but not actually to read it, and that you post this policy and enforce the policy. But other than that I don't know what else you can do.

THE COURT: Are we talking about pleading papers now, or—

THE WITNESS: Yes.

THE COURT: —letters to lawyers?

THE WITNESS: We're generally talking about pleadings and attachments.

THE COURT: Why would pleading papers breach confidentiality, since presumably pleading papers would be seen as soon as they're served on the other side?

THE WITNESS: Oh, that's true. It might be a situation where—I guess in pleading papers you're right. I don't see how that would be a problem.

[170] THE COURT: Yeah, I don't either.

THE WITNESS: But another part of the problem is that in many situations prisoners are the ones who do the copying, and there are a lot of prisoners who don't want other prisoners to know the facts of their case, or whatever it is. But again, other than just putting up a policy and enforcing it I don't know what else can be done.

BY MR. ADAMS:

Q: Isn't that true that something—papers can be in various stages of completion, for example the draft?

THE COURT: For instance what?

BY MR. ADAMS:

Q: For example a draft, pleading papers can be in various stages of completion?

A: Sure. Sure.

Q: And as to that they would not be prepared to be filed and they will not go public.

A: Right: They might not be something that's going to be turned over, very, very definitely. Right.

MR. ADAMS: One moment with counsel.

(Pause)

MR. ADAMS: No further questions at this time.

* * * *

[173] from your direct exam that you haven't actually worked in a prison setting since 1983. Isn't that correct?

A: I have not been employed, right, since 1983, when I left Prison Legal Services in Michigan.

Q: Okay.

A: That's correct.

Q: And at the—when you were working for Prison Legal Services in Michigan isn't it true that you weren't allowed to bring lawsuits against the Michigan Department of Corrections?

A: We were not allowed to represent—formally represent prisoners in suits against the department. We were allowed to advise, but not to actually put our names in formal representation as lawyers.

Q: I think you talked a little bit about some other trials or other cases that you've testified on as an expert. I believe it was three other occasions besides this one. Is that correct?

A: I've only—of the cases that I worked on, one of them other than this actually went to trial where I was qualified as an expert and testified as an expert. In one

other, and in two others I testified in a little bit of different capacity.

Q: As an expert in the two others?

A: I could be specific if you would like.

[174] Q: Certainly.

A: In the case of Hadix v. Johnson, a case in the Eastern District of Michigan, I was—that was a suit, among other things, about access to the court. At the time the suit started I was the director of the program in the prison—

Q: Maybe I could interrupt you. Is that the one where you basically were a fact witness?

A: That's right. I was a fact witness—

Q: Okay. So—

A: —in that case.

Q: —if I understand then, besides this case there's only one other case in which you have testified as an expert witness?

A: That's correct.

Q: And on that other occasion were you also hired by the National Prison Project?

A: Yes, I was.

Q: You've talked a little bit about the different facilities and the different units that you went to within the facilities when you went on your tour. I don't know if it was clear on direct examination, when was the last time you visited a facility in the Arizona Department of Corrections?

A: My tours were on March 21, 22 and 23 of 1990, and August 20, 21, 22 and 23 of 1990.

Q: Okay. And it's my understanding that on all of those [175] tours that you went through through the Arizona Department of Corrections, you did not visit the law libraries—the two law libraries at Winslow. Is that correct?

A: That's correct. I was never at Winslow.

Q: And you were never at the law library at Alhambra?

A: Correct.

Q: You were never at the law library in Yuma?

A: That's right.

Q: You were never at the law library in Safford?

A: Correct.

Q: You were not at the law library in Ft. Grant?

A: Correct.

Q: And you did not go to the central unit law library in Florence?

A: Correct.

THE COURT: I think he testified that was because it was covered by Gluth decision.

MR. STRUCK: I understand, Your Honor.

BY MR. STRUCK:

Q: And also you did not go to the Rhining unit that is in ASPC Iman. Is that correct?

A: That is true.

Q: You testified about some opinions regarding the departmental indigency policy. You can't give a specific dollar figure that you think is appropriate. Is that [176] correct?

A: I just haven't thought about it, no. I'm not prepared to, no. That's correct.

Q: And in fact you have no idea what the department based on—the \$22 figure on. Is that right?

A: That's right, and I said that.

Q: And correct me if I'm wrong, but you don't know of any inmate who had to forego legal supplies or basic hygiene supplies as a result of this indigency policy. Isn't that correct?

A: No, that is not correct. I had people tell me that they had to chose in some situations.

Q: And who told you that they had to chose, sir?

A: I can go to my notes and find those.

Q: Okay. I have been through your notes and I didn't see that, so—

A: Okay.

Q: —maybe that might be—otherwise I would not have asked you. Maybe it might be a good idea for you to do that.

A: Okay. Then the situation I was thinking of is, again, where someone told me that he knew of situations where that had happened.

Q: Okay. So in other words the particular person that you talked to, that didn't happen to them. Is that right?

A: That's my understanding, yes.

[177] Q: And they were just telling you what they had been told by someone else?

A: By a number of people, yes.

Q: Okay.

THE COURT: Was this an inmate?

THE WITNESS: Yes, it was, Your Honor.

BY MR. STRUCK:

Q: So in other words, you can't tell us as you sit here today any specific inmates that had that particular problem. Is that correct?

A: Correct.

Q: There was some testimony about how various facilities or various libraries within the units don't allow access to the stacks, and we have stipulated facts on which units that is. And I think that your testimony was that in your opinion it was difficult to do legal research if you didn't have actual access to the stacks. You couldn't browse the stacks. Is that your testimony, sir?

A: Yes.

Q: Wouldn't you agree with me, sir, though, that an inmate would still have the ability to do legal research even though he doesn't have access to the stacks?

A: No, not necessarily. Given all of the other difficulties that I mentioned with reading abilities, etcetera—now if the person had all the other attributes that would allow him [178] to do that, again, reading ability, intel-

lect, etcetera, then perhaps that alone wouldn't do it. But this is just another factor that makes it more difficult, and in some situations makes it impossible for certain people to conduct legal research.

Q: Sir, do you have any knowledge of any inmates that missed a deadline or couldn't file a pleading because they didn't have access to the stacks?

A: No, not for that reason, no, I don't.

Q: Mr. Wilbur, do you acknowledge that at prison facilities a problem that occurs within the law library collections is that vandalism occurs, that inmates tear pages out of—and cases out of law books?

A: Just like law school, yes.

Q: That's right, and you do acknowledge that that is a problem?

A: It certainly—yes, is a problem, can be a problem.

THE COURT: Particularly the racy decisions, as I recall.

BY MR. STRUCK:

Q: There's been some testimony today about your opinion that there are illiterate inmates within the Department of Corrections that don't have access to the courts because they can't conduct their own research. Is that—

A: Yes.

[179] Q: Do you know what the literacy rate is within the Arizona Department of Corrections systems?

A: No, not—no, I do not.

Q: Do you know of any inmate who was denied access to the courts or unable to do legal research because he was illiterate?

A: I had inmates who told me that they just could not use a law library, and that was one of the reasons.

Q: Okay. Again, could you look through your notes and tell me what specific inmates told you that because they were illiterate they couldn't use the law library?

A: Okay. Now again, as I said, there are a number of people that told me they were unable. Whether or not my notes actually say this person said this was the exact reason, my opinion was that that's one of the factors that—again, Susan Coker at ACW told me she just did not know how to use a law library.

Q: Sir, did she tell—

A: She did not specifically mention literacy.

Q: Okay. My question is specifically as to literacy.

A: Okay. I do not know without looking if anyone specifically identified that as the reason they could not.

* * * *

[181] THE COURT: Yeah. That's what I mean about this not being a proper vehicle for dealing with the problems that really exist, including the problem of illiterates. I mean this is not a fight over who is going to get the biggest share of a corporate takeover or get the most bucks out of reshuffling of money, or something like that.

THE WITNESS: Again, I don't have any situation where someone specifically said that was the exact or only reason they could not utilize the law library.

BY MR. STRUCK:

Q: Okay. So just so I understand your testimony, you can't say today that you talked to an inmate who said I'm illiterate and I can't use the law library. Is that correct?

A: I did have one inmate who told me that he was dyslexic and had been diagnosed as dyslexic and couldn't read, an inmate at SMU. He certainly couldn't use the law library.

Q: Okay. Did that particular inmate—do you happen to know what his name is?

A: I can tell you. Okay. Yes. His name was Frank Bartholic.

Q: Okay. Yes. Frank Bartholic. Now listen to my question carefully, can you tell me that Mr. Bartholic

told you because of this dyslexia problem he wasn't able to file something with the court or he missed a court deadline, [182] basically that he couldn't access the court because of that problem?

A: Well, he told me he was dyslexic. He told me—I'm referring to my notes. He told me that he can't read or write, except very slowly, that he can't write letters. I probably made the leap that it would be difficult for him to do legal research. He may not have actually specifically said that to me.

Q: So then your testimony is, sir, you can't say whether he, as a result of this problem, could not access the court. Is that correct?

A: No, I think I can say that. What I can't say is that he told me specifically that it was dyslexia that kept him from doing it, but I think I can say based on my experience that if he's dyslexic, as he said, and has those problems that he could not access the courts on his own and do legal research.

Q: Okay. But my question is did this inmate tell you—

THE COURT: He already said he didn't, told you two times.

THE WITNESS: He didn't tell me.

MR. STRUCK: Okay. Well, I just want to—

THE COURT: Three times.

MR. STRUCK: —make it clear. Okay. I didn't—

THE COURT: I don't know how a fourth time makes it clearer.

[183] MR. STRUCK: I didn't hear that the way you heard it. So I can move on.

BY MR. STRUCK:

Q: There's also some testimony regarding inmates who can't speak English earlier. Do you know what the percentage of non English speaking inmates is within the Department of Corrections?

A: No, I do not.

Q: Do you know of any particular inmates who were denied access to the courts, couldn't file a pleading, missed a deadline because they can't speak English.

A: Again, I was told that there were no English speaking prisoners who were unable to use the libraries, etcetera, but I did not actually speak to any of them.

Q: Okay. So in other words you don't know that any of them had a problem accessing the court?

A: None told me that directly. Correct.

Q: Okay. There was also some testimony this afternoon regarding training, and when I'm referring to training I'm talking about actual training of the inmates. And—let's see, I believe that you said that there is—the legal assistants have no training. That was a quote that I wrote down right here. Is that—

A: Well, I might have. I know I also said they don't have any systematic intensive training program, but generally they [184] don't have training. Yes, that's my testimony.

Q: Okay. So—

A: Generally there's no training.

Q: But you are aware that there is training in some of the facilities within the Department of Corrections?

A: Well, I am aware that on one—

THE COURT: Are we excluding the ones covered—

MR. STRUCK: I'm talking about—

THE COURT: —by the Gluth decision?

MR. STRUCK: I'm talking just about the facilities that Mr. Wilbur visited.

THE WITNESS: I am—

THE COURT: Okay.

THE WITNESS: I'm sorry. I am aware that at Tucson there was a one day training class given to some legal assistants. I'm not sure if it was given one time or twice, at least at the time that I visited. I'm aware of that if that's what you mean.

BY MR. STRUCK:

Q: In fact don't your notes reflect that that was an 18 and a half hour program?

A: Perhaps. I don't remember if they do or not.

Q: You actually spoke with the individual who was responsible for the program, Mr. Street?

A: Mr. Street are you referring to?

[185] Q: Yes sir. If you find your note—

A: Let me turn—

Q: —that says—

A: What page number on the top left does my notes have of the—

Q: Let me look.

A: —Tucson there?

Q: It's page seven, Tucson.

A: Thank you.

Q: Says Tucson continued at the top of the page.

A: Yes. It says that there was 18 and a half hours worth of training is what he told me, yes.

Q: Isn't it true that there is also paralegal courses that are available through correspondence or otherwise to inmates?

A: There may be. I'm not—I can't tell you any specific ones. I don't know what's available here in Arizona, etcetera, but—

Q: You didn't—do you recall speaking to Mr. John Adamson?

A: I recall speaking to him.

Q: Okay. Let me see if I can find—

A: I can—

Q: —Mr. Adamson in your notes.

A: I can find it. He might have—well, I don't remember.

Q: He's on page—well, there's no page number on my copy. It's 3/23 CB6.

[186] A: So is it the first—were his names at the top?

Q: Yes sir.

A: Okay. And where on that page? I've got that page.

Q: If you look down in the middle that says—

A: But he took a—okay. He took a legal research course. What I said is there's no training provided by the Department of—

Q: Okay. Okay.

A: —of Corrections.

Q: But my question is then, you are aware that there are training courses available for inmates to take?

A: I assume that was taken before he was an inmate, but I don't know. It says it was at ASU.

Q: Okay.

A: I don't know though. I don't know.

Q: Would you read the next sentence please?

A: Was a Central Arizona—well, he took a legal research course at ASU before prison, said.

Q: Yeah.

A: Was a Central Arizona College research course via television that he evidently took.

Q: Okay.

A: Yes.

* * * *

[189] MR. STRUCK: Your Honor, at this time I would like to move to admit—or actually we've stipulated to Exhibit 814, which is a—

THE COURT: Well, is that agreeable counsel, 814? Counsel for plaintiffs, is that agreeable? Any objection?

MR. ADAMS: We have no objection. It's just that doesn't go to the point that Mr. Wilbur is speaking to.

MR. STRUCK: Well that—

THE COURT: Well, I don't really care at this point what it is, just so long if you stipulate to it I'll let it in. Okay. It's admitted.

MR. STRUCK: Thank you.

THE COURT: Because I'm not going to read it right now anyway.

BY MR. STRUCK:

Q: Well, Exhibit 814 is the New York State Department of Correctional Services Handbook for Administration of Correctional Facility Law Libraries.

A: Yes.

Q: Okay. Are you aware that the legal training program within the New York correctional system calls for inmates training other inmates?

A: I read that, but that's not what I was talking about when I answered in the deposition. I was talking about—

* * * *

[193] A: No, I'm not.

Q: On your tour did anyone ever discuss with you the availability of Arizona State Law School Clinic?

A: I don't recall that, no. Somebody might have mentioned it to me but I don't recall.

Q: Okay. Why don't you look at your notes.

A: Okay.

Q: That's at Perryville page three.

(Pause)

THE COURT: Kind of interesting, when they did do that there was vociferous protest that state fund used to do that, and the legislature let it—and the governor agreed to let it go.

MR. STRUCK: The fact remains that it is available.

THE COURT: That's kind of interesting though.

THE WITNESS: Yes, that's probably why I recall it. There's an indication here that someone told me there was some kind of program at ASU Law School.

BY MR. STRUCK:

Q: That provides legal assistance to inmates at Perryville?

A: My note says that this person:

"Says ASU Law School has inmate legal assistant program. He writes them if he is at an impasse."

Q: Okay.

THE COURT: I guess it was the Board of Regents [194] that agreed to let them continue doing what they're doing, namely use state funds to represent prisoners, even though the Department of Corrections objected to it.

BY MR. STRUCK:

Q: Are you familiar with the Capital Representation Project?

A: Here in Arizona?

Q: Yes sir.

A: Not specifically. I'm familiar with the fact that they have those in states that have the death penalty but not—don't have any firsthand knowledge of Arizona's.

Q: Getting back to training again. I believe in your direct examination today you said that there is no staff training. Is that correct, DOC staff training?

A: For librarians?

Q: Yes sir.

A: Library staff?

Q: Sir sir.

A: Yeah. There's no program of training, yes. I think something to that effect, yes.

Q: Okay. Would you agree with me though that a lot of the staff within the Arizona Department of Corrections that work in the law libraries are training and have been able to attend different programs for training?

A: I know of one. Everyone—a number of the library staff people at various institutions mentioned they had gone to [195] Northern Arizona University for a day or a couple of day program. That's the one everyone seemed to mention to me. That's the only one I'm familiar with. There may be others.

Q: Okay. And you say a number of them told you that?

A: At least two or three did.

Q: Okay.

THE COURT: By the way, I mentioned that earlier one because I was taking judicial notice of the fact it involved a case in which I was the presiding judge about the Department of Corrections opposing the Arizona State College of Law, the project assisting inmates in the prison.

BY MR. STRUCK:

Q: Now there is some testimony today about the adequacy of the collections within the Arizona Department of Corrections. You would agree with me that the law libraries within the Arizona Department of Corrections are essentially adequate?

A: Yes.

Q: In fact, they're pretty good. Aren't they?

A: As prison law libraries go, yes, they certainly are.

Q: Let me just go through your notes on some of the law libraries that you reviewed, sir. The Mohave law library, you recall writing in there that the collection was more than adequate?

A: Not specifically, but I'm sure I did. If you tell me that I'm—again, I generally believe that the law library [196] collections are very adequate for prison law libraries.

Q: In fact the Perryville facility law library, you said that it was excellent, totally up to date law library, and it was the most complete prison law library you have ever seen. Is that accurate?

A: I think I was carried away and said that in my notes. Yes. I remember saying that.

Q: But you did write that down?

A: But yeah, and I have no problem with the adequacy of the libraries. The problem is no one knows how to use them.

Q: I understand that's your opinion, sir. Thank you. I have no further questions.

MS. AIYETORO: Your Honor, could we have—

MR. ADAMS: And Your Honor, I request a two minute break.

THE COURT: You want a break you say?

MR. ADAMS: Yes, Your Honor, please.

THE COURT: All right. I have to quit at 4:00 remember.

* * * *

DECEMBER 17, 1991

* * * *

[60] CROSS EXAMINATION

BY MR. STRUCK:

Q: Mr. Celaya, in regard to your testimony about legal assistance, I believe you testified that you requested a particular inmate, Richard Gray, and you were denied access to that particular legal assistant. Is that correct?

A: At one point, yes.

Q: Is it your understanding that the reason why you were denied access to that particular inmate is because he was a different custody level than you were?

A: No, not different custody level, different side of the building, of the unit.

Q: At the time that you were denied access to Mr. Gray, were you told that you couldn't have access to any legal assistance?

A: No I was not, other than inmate Gray not being a legal representative.

Q: And in fact after you got the list of legal assistants, you made a request for a different legal assistant, and [61] obtained help on your legal work. Isn't that right?

A: Yes I did.

Q: The telephone call that we just discussed, once it was cleared up that the call actually was from your

lawyer, or actually was going to be to your lawyer, didn't you get the call within one and a half week—about a week and a half of when you first requested the call?

A: Yes I did.

Q: When we talk about the confidential information area that you testified about, now I believe you said your last violation was around March of 1988, and you said that was a 3-7, using hands and fists. Is that right?

A: Yes.

MS. AIYETORO: Your Honor, I'd like to have the record clear. He said his last major violation or minor as well.

MR. STRUCK: Fine, okay. I'm talking about major violations. I'm sorry.

BY MR. STRUCK:

Q: Now a 3-7, using hands and fists, that's actually punching somebody or—is that correct?

A: Yes it is.

* * * *

[110] THE COURT: —and point the mike toward your mouth, and get close to it?

BY MS. AIYETORO:

Q: Unfortunately we're getting a new mike after you testify. Mr. Bishop, where are you present incarcerated?

A: The Arizona State Prison, Florence, Special Management Unit.

Q: And how long have you been in the Special Management Unit?

A: Since February 12th of '88.

Q: And what is your custody level?

A: My public risk score is a four, and my institution risk score is a one.

Q: Do you have a paid or volunteer job in the Special Management Unit?

A: It's volunteer.

Q: It's a volunteer job? What do you do?

A: Legal assistant.

Q: And what does a legal assistant do?

A: Just about everything that comes up, from disciplinary to, you know, assisting guys for fines, post convictions, or appeals, or several cases, just whatever.

Q: How did you become a legal assistant?

A: Just volunteered for it back in March of '88.

Q: Did you send a letter or a memo to anybody?

[111] A: Well they have a weekly bulletin at SMU. It comes out on Friday night, and they were asking for them, and they didn't have one in the area where I lived. So I put a kite in, and I guess it was Mr. Upchurch that gave me the job.

Q: Now you said that they didn't have one at that time in the area you were in. Where were you?

A: Wing one, Able Cluster.

Q: And how many prisoners were in that area?

A: Forty-eight.

Q: What are—as a legal assistant, I know you described what did you do. Did the ADC or the Arizona Department of Corrections provide you with any training to perform the function of a legal assistant?

A: No ma'am.

Q: Did you obtain any training to perform that function anywhere else?

A: No. I've been involved in a couple paralegal courses, but I never finished them.

Q: Where were the courses that you participated in?

A: One was in Jefferson City, Missouri at Missouri State Prison, and the other one, I didn't get to finish that because I came back to Arizona. And the other one was from a correspondence course from the Southern Career Institute here last year, and I didn't get to finish that either.

* * * *

[113] THE COURT: In other words, you were it before that. You were the legal assistant?

THE WITNESS: Yes, Your Honor.

THE COURT: Before that?

THE WITNESS: Yes.

THE COURT: How long a period of time before that were you the legal assistant there?

THE WITNESS: I would say probably about two years. I believe that it was in October-November of '89 when—

BY MS. AIYETORO:

Q: You had the short break in service?

A: Yes.

Q: Are you able to help everyone who requests your help?

A: Well for the most part, yes. There's a couple guys there now, and have been for the last few years, that I haven't been able to do anything for.

Q: And why is that?

A: Well both of them are blind. And I've attempted, in October of '88 when I was brought back to—I was gone for about four months at the Gila County Jail. When I came back I had a guy approach me about helping him. I filed a State habeas corpus for him, and it got to where I couldn't get access to this guy, and I couldn't communicate with him. Because everything in his case was predicated on a medical [114] issue of his being blind, and his medical records are confidential. The State wouldn't let me look at them, and he had no way of reading them, and they wouldn't read them to him, and it just became to the point where it was just too frustrating for me, and I couldn't do nothing for the guy.

Q: And who was that prisoner?

A: Roman Stone.

Q: Now do prisoners come to you for assistance who are unable to read and write, to your knowledge?

A: Yes, definitely.

Q: How frequently does that happen?

A: It's not that frequent, but it does occur. One guy whose case is in this court right here. I've had it for about two years. The guy has a third grade—he can't even hardly write his name. I have to read everything. Every document he gets I have to read to him. Then I have to—whatever I prepare for him to file, I have to go read it to him, and he just doesn't—he has no concept of anything.

Q: Would you say it happens once a month that someone comes to you that's very limited?

A: Well it's kind of hard to pinpoint exact times, because, you know, it might happen two or three times in a row, and then not happen for a few months. But it is rampant there in SMU people, that—

Q: So that in your cluster, over the past several years, [115] you've gotten a number of prisoners who have come to you for assistance who were unable to read and write. Is that true?

A: Yes ma'am.

Q: And when you get someone that are unable to read and write—I know you have the example of this one prisoner who was unable to read and write, and you had to read his material for him.

A: Yes.

Q: Is that true with all of them that are unable to read and write? You have to assist to that extent?

A: Yes, if it's possible. Some of them, I try to get other guys that are right in their pods with them to read it to them.

Q: Now I think it may be helpful, because you're restricted to working within a cluster, if you could describe—is the cluster like one big room with cells all around?

A: No ma'am. It's—there's six pods.

Q: And by pods, are those like defined living areas with cells?

A: Yes ma'am.

Q: Okay.

A: There are eight cells in each pod, and there's six pods to a cluster, and this is isolated off of a hallway, you know, and there's four of those on each one of the wings.

* * * *

[117] BY MS. AIYETORO:

Q: Were—do you recall assisting Mr. Madden in any legal matters in 1988?

A: Yes ma'am. I handled a case for him in district court in Tucson that we prevailed on on a plaintiff's motion for summary judgment.

Q: And was Mr. Madden one of those prisoners who could read and write?

A: Yes.

Q: And did you at some point ask him to do something?

A: Well at the time I was real busy with some stuff I had. So instead of me going to the library and looking stuff up, I would write down a list of stuff for him to go look up and to read, and it was quite frequent, probably two or three times a week.

Q: Now if—have you asked prisoners, as you have with Mr. Madden, or did with Mr. Madden, to go and get things for you, and have any problems with them bringing that material back or information back?

[118] A: Yes.

Q: And what have been the problems?

A: Well a lot of the problems are the guys will go up there, and they'll ask for it, and they'll come back. Can I give you an example?

Q: Why don't you give an example, and we'll see if—

A: I had an old code prisoner, Frank Bender, and I told him to go up and look at State v. Valenzuela, which is the Arizona Supreme Court's decision on good time credits for old code prisoners. So the guy comes

back, and I said well what happened. He said I didn't get it.

MR. HOCHULI: Objection, hearsay, Your Honor.

MS. AIYETORO: When the—

THE COURT: Yeah.

MS. AIYETORO: I will rephrase the question, Your Honor.

BY MS. AIYETORO:

Q: When he came back, did he have the information that you wanted him to have?

A: No ma'am, he didn't.

Q: Were you in the cluster when they took him out?

A: Yes.

Q: And is it made clear when they take prisoners out, where they're taking them?

A: Yes it is.

* * * *

[138] THE COURT: Well I don't want to get into a lot of this stuff. Mr. Hochuli sometimes has a flash point that I don't find particularly helpful, particularly when we have a serious issue before the Court, and he tells me I go on and on. I take very seriously if writs aren't followed, and the orders of the Court aren't obeyed. That's my job you know. But at any rate, we'll see what the green cards say. Let's not get into an argument about it. We'll see what they say, and we can go on from there.

BY MS. AIYETORO:

Q: I'm sorry, Mr. Bishop. I think we were just finishing up talking about the officers in the—in your meeting with your legal representative—

A: Yes ma'am.

Q: —or when you are meeting with people that you are representing. Have you had any problems with staff after providing legal assistance to any prisoner?

A: Yeah. There's been a few isolated cases that were significant enough for me to remember. You know a lot of things happen. You know you have to—

Q: Can you give me one example of a problem that you had?

A: Yes. There was a guy—in fact I filed a civil complaint for him. In fact it was right here I believe before Your [139] Honor here. It was Nathan Daley v. Officer Aragon. Guy got his head smashed—allegedly smashed in the concrete. I filed a suit for the guy, you know. And then all of a sudden, you know, my cell started getting shook down two or three times a week, and you know, I started getting talked to like I was an idiot, you know, and locked in the shower for extended periods, and denied rec and shower and stuff like that.

And then when it came to a head, I was on Ramidon fast. And the officer come up and picked up my tray, and it had a cigarette butt in it. You know, you're not supposed to smoke or drink or anything during daylight hours. Well it was already after dark. So the guy tells me well that's it. You know, you're off of Ramidon. So I confronted him with the issue right then, and we had some words—

THE COURT: What is the guard's name? Do you know?

THE WITNESS: Officer Aragon. And we had a confrontation about it right there at the cell front. And the guy just told me—he said hey, what goes around comes around. Well that led me to believe that everything that was happening to me was because of this incident where I filed a suit against him. So I immediately wrote a letter to Major Padilla, and the incident—it was rectified, and I've never had any problem with the guy since.

BY MS. AIYETORO:

* * * *

[143] Q: Mr. Bishop, do you have occasion to use the law library?

A: Yes ma'am.

Q: How often do you use it?

A: At least as necessary, at least as possible.

Q: How often do you use it?

A: I would say an average once a month, sometimes more if I really have to go up there.

Q: How do you request to go to the law library?

A: You fill out an institution kite, and turn it in on the graveyard shift, which is the shift from 9:00 till 5:00 in the morning, something like that.

Q: The shift is from 9:00 at night till 5:00 in the morning?

A: Yes, ma'am.

Q: How long does it usually take to get to the law library after you make a request?

A: Now or then?

Q: Why don't you tell me now, and tell me how long that's been the case.

A: It takes about 48 hours, and that's picked up just in the last maybe two, two and a half months.

* * * *

[145] * * * sit when you go to the law library.

A: It's a small room approximately three and a half by five. It has a stool that sits in front of a desk similar to this one here. Just above that there is a tray slot. It's approximately I would say maybe five by nine slot.

Q: Five inches by nine inches?

A: Yes ma'am. And it has a key on it where it's locked. And just above that is a window. I would say—I don't know the dimensions, a little wider than your hand, and probably two and a half foot tall.

And you go in there. And to get the people's attention in the law library, you have to knock on the window, and they're in another room inside of the law library itself. And you knock on the window, and they come and open the door, and they ask you what you want.

Q: And when you say they ask you what you want, who is they?

A: One of the correctional officers or the librarian that works in the library.

Q: And have you ever had any problems getting the books you needed from either the officer or the law librarian?

A: Yes, definitely. And one of the reasons is I don't know what's in there.

Q: And what problems have you had?

A: Well you have to be specific, you know, exact citations on what you want. Like if you go in and you ask for—are [146] you referring to me or—

Q: I'm asking to you.

A: —any prisoner in general?

Q: No. I'm asking for you personally.

A: With me it's not that significant, because I know what a descriptive word index is, and the case index and stuff like that.

Q: But you have to ask specifically for what you want.

A: Yes.

Q: The descriptive word index, or case index, or a volume of a book.

A: Yes.

(Change of Tape)

BY MS. AIYETORO:

Q: Now are there law clerks, prisoner law clerks in the law library?

A: Yes there are.

Q: And do they ever come and talk with you, and help you get material?

A: Definitely not. They're not allowed to.

Q: They're not allowed to talk with you.

A: No ma'am.

Q: Now you indicated that one of the problems is that many times you don't know exactly what may be in the law library, other than I would assume the general materials that are * * *

* * *
[148] Q: Are there books that in your experience are especially helpful in preparing lawsuits?

A: Well yes ma'am. Can I explain that?

Q: Well I was going to ask you what books are they?

A: You mean lawsuits or criminal or—

Q: Well why don't you give me some ideas of some books that you have found to be helpful in preparing lawsuits, whether they be criminal or civil or whatever.

A: Are we talking about for myself, or for any prisoner that utilizes the law library?

Q: Well at this point we have to just talk about you, because you're the witness. You can't talk about what other prisoners have told you, 'cause then you're draw a hearsay objection, and I've got to argue with the counsel about it.

A: Yes ma'am.

Q: I don't want to do that.

A: I think the best for any prisoner, especially like myself who, you know, isn't educated. I only have a sixth grade education, formal education.

Q: Uh huh.

A: I received my GED in 1985. So therefore, you know, my—there's a lot of things I don't understand. The Prisoner Self Help Litigation Manual. You can under—anybody that can read and write can understand it. I mean it just takes you step by step.

* * * * *

[150] Q: And has there been a time when you haven't had those two things, Prisoner Self Help Litigation Manual and the Georgetown Law Journal?

A: You mean my own personal ones?

Q: Yes.

A: There's been times when I haven't had the up-to-date ones. I don't have the up-to-date ones now.

Q: Has it been more difficult for you to get into what you were doing without the use of those volumes?

A: Definitely.

THE COURT: Can I ask you something? This is not one within the Gluth decision I take it.

MS. AIYETORO: No. It's not within the—

THE COURT: Where is this precisely, this institution? Where is it—

MS. AIYETORO: Special Management Unit. It's in Florence, Your Honor. It used to be by itself, but now that they've opened what they call the Rynning Unit, it is the unit of the Rynning Unit. It's the highest security facility in the State of Arizona.

THE COURT: And it wasn't—as I recall, it wasn't covered by Gluth.

MS. AIYETORO: No, it wasn't covered by Gluth at [151] all.

THE COURT: Guess we're going to hack away prison by prison, huh, throughout the whole state?

MS. AIYETORO: Well we're hoping since this is a statewide case, Your Honor, we can get a—if we prevail, we can get a statewide order.

BY MS. AIYETORO:

Q: How do you get legal documents copied?

A: You have to put them in an envelope. And between 9:00 and midnight you have to slide them under your door.

Q: 9:00 p.m. and midnight.

A: Yes ma'am. Excuse me.

Q: Uh huh.

A: Between 9:00 p.m. and midnight, you have to slide them under your door, and then an officer picks them up.

Q: And how long does it take to get the copies back?

A: Well again that's—you mean now?

Q: Now.

A: It takes about two to three days now.

Q: And has that been a problem in the past? Or I'm sorry, not a problem in the past. Has that taken longer in the past?

A: It's longer and shorter. For a while there I was getting them back in 24 hours, and it has taken as long as 12 days.

Q: Is carbon paper allowed in the SMU?

[152] A: No ma'am.

Q: And have you ever filed a grievance concerning carbon paper not being allowed?

A: I filed a grievance, and followed it all the way through the director, Mr. Lewis.

Q: And why did you grieve not having carbon paper?

A: Well I write a lot of letters to guys for their lawyers and stuff like that. And to get copies of that, you have to—like I say, you have to put it in an envelope similar to this manilla envelope here, and slide it under your door. Well you don't know how many people's hands it goes through. Then when it gets to the library, all the copying is done by prisoners.

And what I think is significant about it, it's not the fact that maybe just a prisoner takes it out and copies it, but right up on the wall over the copier, there's a note to anyone who uses the copying machine, that they have to log down and identify what the document is that they have copied for a specific prisoner. So therefore any prisoner who picks it up has to read at least part of it to find out what it is. And I have personally observed them guys 50 times. I'm standing there watching prisoners go through and read every single word on whatever they're copying, my documents included.

* * * *

[166] CROSS EXAMINATION

BY MR. HOCHULI:

Q: Is it Department policy that inmates do their own research, or a legal assistant can do research for another inmate. Is that correct?

A: Yes sir, either way.

Q: So inmate Madden is not allowed to do research for you. He can do research for himself. Is that correct?

A: No it's not correct.

Q: Is inmate Madden a legal assistant?

A: No he isn't.

Q: You said that he is not—that inmates are allowed to only do legal research for themselves, or if you're a legal assistant you can do research for someone else. Correct?

A: I'm sorry. I misunderstood your question.

Q: Okay.

A: But no, there's no rule that says one prisoner can not do research for another one.

Q: Okay. Am I correct that as of two months ago you were handling approximately 11 cases?

A: Yes. It's more now.

Q: And of those 11 cases, seven of them were yours.

A: Yes sir. But if I may explain myself. Those are—

* * * *

[198] Q: Was this a leg brace?

A: Yes sir.

Q: I'm sorry. Go ahead.

A: My leg kept buckling on me, and causing me a lot of problems.

Q: And so you went to sick call about this?

A: Yes Sir.

Q: And how long did it take you to see the provider after going to sick call?

A: About—it went between two and three months. I can't remember exactly.

Q: Can you tell us what your educational background is?

A: Seventh grade special ed.

Q: Do you suffer from any reading disorder or learning disorder?

A: Yes sir.

Q: And what is that?

A: Dyslexia.

Q: Dyslexia?

A: Yes sir.

Q: And when were you first diagnosed with dyslexia?

[199] A: Back in 1972.

Q: So that was when you were quite young. Is that right? How old were you in 1972?

A: I was 12 years old.

Q: How does dyslexia affect you?

A: It causes me to see letters backwards. I miss whole lines when I'm reading, and it makes it where I have to read a lot slower, and reread the same line over and over, make sure I got all of it, and got the words right.

Q: At some point during your incarceration in Arizona, did you file a lawsuit in federal court?

A: Yes sir, I did.

Q: Approximately when was that?

A: In 1987.

Q: Where were you housed at that time?

A: I was in Florence Central Unit.

Q: What was the lawsuit about?

A: It was access to outside recreation, access to the library, and medical. This is down in Tucson.

Q: Did you file this case all by yourself, or did you have some help?

A: I had some help from a co-defendant.

Q: When you say a co-defendant, you mean someone else who was working on the case with you?

A: Yes sir. He had his own case going, and we were filing [200] on the same thing. So he was a lot of help.

Q: What was the name of this person?

A: Gary Chi, Chim, something like that.

Q: Gary Ching?

A: Yes sir.

Q: At some point after you filed this lawsuit, were you transferred?

A: Yes sir, I was.

Q: Where were you transferred to?

A: SMU.

Q: Did you have any difficulty pursuing your lawsuit in SMU?

A: Yes sir, I did.

Q: And why was that?

A: I was taken to the library, and being that you had to specify exactly what case you want, it made it very difficult for me to request the cases I wanted, being that I did not know what cases I wanted. I had to know exact citations and everything. I did not know this information. And I could not get no help from library personnel to help me.

Q: Did you ask library personnel to help you?

A: Yes sir, I did.

Q: Who did you ask?

A: I asked CSO Turner who was the acting librarian.

Q: And what did CSO Turner say?

A: She said that she was not allowed to do that, that I had [201] to request specific information, you know, citations, and then one of the clerks can get that for me that away, but that's the only way I can get the information I need.

Q: So once again you needed to know specific case citations.

A: Yes sir.

Q: And you did not.

A: No sir.

Q: Were there any prisoners available to help you?

A: No sir, there was not.

Q: When you went to use the law library at SMU, how did that work? What was the set up for you using the law library?

A: I'd submit a kite to go to the library, and I have to request it 24 hours in advance. I go—they take me down to the law library, put me in a small room. And well like the other guy said, there's a table about like this, little tiny room, not much room to walk or anything, had a little food window up here, and then it had a big window where they can look through you at, make sure you're working or whatever. And you just tell them what citations you want, and they get them for you.

Q: How—when you came to the library, and were put in that little cage or room, how long were you supposed to be allowed to stay in there?

A: You're supposed to be allowed to stay there, at that time it was two to two and a half hours I think, but I was only [202] staying half an hour.

Q: Why were you only staying half an hour?

A: The librarian would call the officer to escort me back to my cell, because I was being a nuisance and not doing no legal work.

Q: And why were you not—was it true that you were not doing any legal work?

A: No sir. I was trying to find cases that went along with mine by trying to catch the clerks every chance I got when the officer wasn't sitting right there at the desk, and having the clerk tell them what I'm working on, and see if they can find me something to help me.

Q: When you were in SMU, were you—

THE COURT: Excuse me. And that wasn't allowed. Is that why—

THE WITNESS: Yes sir.

BY MR. FATHI:

Q: When you were in SMU, were you ever denied access to law library altogether?

A: Yes sir, I was.

Q: And what reason were you given for that?

A: I was first told it was because being a nuisance, and then later I was told again by my counselor I was being a nuisance. Then it finally came up to the fact that I was being charged with destroying one of the law books.

[203] Q: Let me take those one at a time. Who was your counselor at this time?

A: CSO Perkins—I mean CPO Perkins.

Q: And CPO Perkins told you that you were being denied access to the law library, because you were being a nuisance?

A: Yes sir.

Q: Did CPO Perkins explain how you were being a nuisance?

A: He said that I was going down there. I was not doing no legal research, that I was just trying to get out to talk to people. And every time one of the clerks walked by the window I was knocking on the window trying to get him over there to talk to me.

Q: Were you knocking on the window, and trying to get the clerks over there to talk to you?

A: Only to get some help with what I needed.

Q: And you said that CPO Perkins said you were accused of destroying a book.

A: Yes sir.

Q: Did he ever give you anymore information than that?

A: No sir, he did not.

Q: Did you destroy any book?

A: No sir, I did not. I even requested that I be given a disciplinary action, and a chance to defend myself on the charge that I was being charged with.

Q: Did you ever receive a disciplinary charge out of that?

[204] A: No sir, I did not.

Q: What eventually happened to your lawsuit in federal court that we were discussing earlier?

A: It was dismissed with prejudice.

Q: While you were at SMU, were you able to meet filing deadlines for that lawsuit?

A: No sir, I was not.

Q: Have you ever been denied access to the law library at any other facility you've been housed in?

A: Yes sir.

Q: What facility is that?

A: Winslow.

Q: And when were you denied access to the law library?

A: I'd say it was about four months ago when all the problems really started hitting.

Q: And how did it happen that you were denied access to the law library?

A: I went to the library one day, and I walked up to the law clerk who was standing behind the counter. I requested some cases that I already knew about. I knew what cases I was looking for, and I requested law books on those cases. He told me I had to talk to the staff member working the desk that day. So I went back, and I talked to the counselor who was working there.

* * * *

[253] Q: Did you receive any training from the Arizona Department of Corrections to do this job?

A: No.

Q: Have you ever had any legal training?

A: Yes I have.

Q: Where?

A: In Trenton, New Jersey.

Q: When?

A: It was '76.

Q: And what training was that?

A: It was just research.

Q: So you had a course in research.

A: Right.

Q: Can—

THE COURT: Legal research?

THE WITNESS: Yes.

BY MS. AIYETORO:

Q: Now at the Rynning Unit can prisoners browse the shelves? Can they go and look at what's on the shelf, and take a book and look at it?

A: Yes they can.

Q: And are you responsible—you said that you were responsible for the inventory, did you not?

A: Yes.

* * * *

[256] Q: So I'm asking you are there books that don't appear on the Central list—

A: On the required list?

Q: Yes, on the required list, the list that you've gotten that says these are the books—

A: Right.

Q: —that you are required to have. Are there books that you are familiar with that do not appear on that list that you feel are important to doing legal research and filing lawsuits?

A: Yes I do.

Q: And what books are those?

A: Pacific Seconds.

Q: And why are the Pacific Seconds important?

A: Well I've come to find that in shepherdizing Arizona cases, nine times out of ten you refer to other cases from other states in the west that are covered in the Pacific Seconds.

Q: And if they're not Arizona cases you can't get them. Is that—

A: Exactly.

Q: Now are there any other books that are not on that required list that you find important to doing—

A: Yes.

Q: —research and filing lawsuits?

* * * *

[258] A: Yes I am.

Q: And you said this was a voluntary. How were you selected to be a legal assistant?

A: I submitted the paperwork myself.

Q: Was there like an application form?

A: There's a form that you fill out.

Q: Now did that form test you in any way in terms of your legal knowledge?

A: No it did not.

Q: Now were you provided any training by the Arizona Department of Corrections to be a legal assistant?

A: No.

Q: Approximately how many prisoners request your assistance, say on a weekly basis?

A: An average seven or eight.

Q: And are you able to help all the prisoners that request your help?

A: No.

Q: Why not?

A: Because of the case load and—

Q: And—go on.

A: —and it would interfere with my regular job.

Q: And are you able to refer these to other legal assistants?

A: Yes I am.

[259] Q: And are there prisoners—so everybody who you can't handle, another legal assistant handles them?

A: Not necessarily.

Q: What's the problem with that?

A: Not enough assistants.

Q: How many legal assistants are, to your knowledge, on the yard at Rynning?

A: Eight.

Q: And do you know what the population is at Rynning?

A: It's an 800 man unit, and it's full.

MS. AIYETORO: I have no further questions at this time, Your Honor.

CROSS EXAMINATION

BY MR. STRUCK:

Q: Mr. Doe 1, you testified that you've had problems with ear infections for quite some time. Isn't that true?

A: Yes.

Q: In fact you've had those problems since 1973.

A: Yes.

Q: Prior to coming into the Arizona Department of Corrections, isn't it true that doctors would prescribe drops or pain medication for your ear problems?

A: Yes.

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[9] Q: And if it's an emergency you can get in the same day, can't you?

A: Yes, you can.

Q: Are you aware that there are some inmates that are in lockdown at the Reining Unit?

A: Yes, I am.

Q: Those inmates have direct access to the law library, don't they?

A: Yes, they do.

Q: Thank you.

MR. STRUCK: I have nothing further.

MS. AIYETORO: Nothing further.

THE COURT: Thank you. You can step down. Did I say to you all that if you wanted to have a coffee or Coke on your table you could do it? I wasn't sure if it was your group or the last group you had here last week.

MS. BENDHEIM: Are you ready Aiyetoro? Are you ready?

MS. AIYETORO: Yes, I am.

MS. BENDHEIM: Your Honor, at this time we will—the plaintiffs will call David Murphy.

THE COURT: Okay. Where is he?

MS. BENDHEIM: He's right back here. Mr. Murphy.

THE COURT: I don't think he heard you.

MS. BENDHEIM: Mr. Murphy.

* * * *

[101] THE COURT: Out of your cell you mean, or—

THE WITNESS: Yeah, out of your cell. I mean there's no place for you to work, no place to hold client talks or anything like that.

BY MS. AIYETORO:

Q: Now did you receive any training from the Department of Corrections to do this job?

A: No sir—no ma'am, excuse me.

Q: It's okay. Have you ever received any training in legal research or—

A: I did on my own.

Q: Okay. And where was that?

A: Southern Career Institute, which I'm currently in now.

Q: You're in the program now?

A: Yes, I'm on my last course and then I'll be a—they give you a paralegal certificate.

Q: And you're paying for that on your own?

A: Yes ma'am.

Q: Now you indicated that you had been providing servi—legal services for how long?

A: I believe I applied in 1989.

Q: Now have you ever had any difficulty in providing legal assistance to prisoners in any specific location in the facility?

A: Yes, in—mostly in the complex detention unit.

[102] Q: Could you describe what the problems are?

A: The complex detention unit, before an appointment can be set up, an inmate over there in the detention unit must send in a legal assistant request form, per the policy. Sometimes these forms take quite a long time to get to you, or the inmate won't know who—that there is a legal assistant out there that can help him.

Q: Now do you know prisoners specifically who this has happened to?

A: I know several. Inmate Carrillo is one, and recently—

MR. HOCHULI: Objection. Foundation, Your Honor, so I can hear whether this is based on hearsay or how he knows this information.

BY MS. AIYETORO:

Q: How do you know the prisoners that this has happened to?

A: I—when the problem first occurred I was down there seeing another inmate.

Q: Mmm hmm.

A: And the CSO that was on duty asked me who he gives these legal assistant requests forms to.

Q: Mmm hmm.

A: And I said what do you mean, who do you give them to? And he showed me, and it was inmate Carrillo's who was asking to see me, and that had been a week. It'd been sitting in there for a week. He didn't know that he had to bring them [103] up to the complex unit

Q: So a staff person told you that that was a problem?

A: Yes.

Q: Have you discussed this problem with any person on staff?

A: Yes, I have. I have spoken to Warden Charles L. Ryan through inmate letters, as well as Major Casey Goode.

Q: And who is Major Goode?

A: He's in charge of the complex security, including the complex detention unit.

Q: Now—and Warden Ryan is the warden of the whole facility?

A: Yes, he's the complex warden.

Q: Now has the problem been resolved?

A: No ma'am, it has not.

Q: So does that mean that when you serve as a legal assistant sometimes you get requests for assistance that are a lot later than when the person actually signed it up?

A: Yes ma'am. In fact we tried to implement a policy—

MR. HOCHULI: Objection, Your Honor. There's no question before the witness.

BY MS. AIYETORO:

Q: What did you specifically try to do to resolve the problem?

A: We had wrote a kite to Major Goode outlining a proposal that we had on listing of the legal assistants and the [104] disciplinary representatives, who these kites go to, like to the complex law library, or the CPSs were on both yards, Coronado as well as Kaibab, so the inmates over there in CDU would not only have a listing of who could help them, but who to send the kites to and who could answer their questions.

Q: And what happened to that suggestion?

A: Nothing ever happened to it.

Q: Have you—

THE COURT: So you mean that there is no policy with respect to that, that you're aware of, or procedure?

THE WITNESS: Just—as far as what sir?

THE COURT: What you just described, that nothing happened with respect to that. What—is there any procedure at all by which the—which you said you—the plan you proposed to them. Is there any procedure to take care of that?

THE WITNESS: No sir.

MS. AIYETORO: I'm sorry, Your Honor.

THE WITNESS: The one procedure that they have in place allows the inmates to come from CDU to the law library to utilize the law library, but the institution says they can't do it. They won't do it, period.

THE COURT: They won't do what?

THE WITNESS: They won't allow an inmate to come from CDU to utilize the law library.

[105] THE COURT: Who is the—who is—is that?

THE WITNESS: Warden Herman, Jack Schwartz, the CPS, Major Goode.

THE COURT: They told you that personally?

THE WITNESS: Personally.

BY MS. AIYETORO:

Q: Now do prisoners ever come to you with legal problems you feel you're unable to handle?

A: Yes ma'am.

Q: And how often does that happen?

A: Quite frequently.

Q: And why do you feel you're unable to handle them?

A: Well I'm not a lawyer. I know a little bit about the law. I'm just an inmate who learned, and is still continuing to learn about law. So there's many types of litigation that I know nothing about.

Q: What do you do in that situation?

A: Well, we hope that there's somebody else, another legal assistant that might be able to help them.

Q: Okay. Is there ever a time that you can't refer them to anybody?

A: Quite a few times.

Q: Now since you've been a legal assistant at Kaibab has there always been at least one Spanish speaking legal assistant, to your knowledge?

[106] A: No ma'am.

Q: And do you speak Spanish?

A: No ma'am.

Q: Have you ever had a client who spoke little or no English?

A: Yes ma'am. I just brought this to the deputy warden's attention two—about a month ago, excuse me. His name is inmate Quazada.

Q: Okay. And how do you handle such a client?

A: I have to get another inmate that speaks Spanish, and hope that this guy isn't on a sensitive case.

Q: How do you go about meeting with the prisoner you are attempting to assist?

A: The inmate has to request me, I cannot request him, to see him. So if I'm working on his case I have to either catch him on the yard and tell him to fill out a legal assistant request, and then we meet up in the law library.

Q: Have you ever needed to meet with a prisoner you're assisting but were unable to set up a meeting because the prisoner didn't initiate it?

A: Many times.

* * * *

[110] Q: Have you ever tried to do that?

A: Yes ma'am.

Q: And what have you attempted to do?

A: We asked the law librarian, as well as the CPS, if we—and the deputy warden, if we could have some kind of private area. Because some of the cases that we work on are sensitive in nature, so we'll—we want to pull them off to the side. You don't want to talk in front of everybody when you're dealing with a sensitive case; it could get the person killed. And usually you have to walk outside.

MS. AIYETORO: Your Honor, I have no further questions.

MR. HOCHULI: Your Honor, I just have four or five questions.

THE COURT: Okay.

CROSS EXAMINATION

BY MR. HOCHULI:

Q: Mr. Johns, one of the crimes for which you're currently serving time is fraud. Is that correct?

A: Yes sir.

MS. AIYETORO: I'm sorry, Your Honor. I was distracted.

THE COURT: One of the crimes of which he's [111] currently serving is fraud, and he answered yes.

MS. AIYETORO: Your Honor, I'd like to say that I'm sorry, I was distracted. And so I apologize to the Court and to the client. That I'd like to have the question and answer struck. The Court has ruled on several occasions that the felony cases that these prisoners have, taken

under judicial notice, that all of them have felonies. And most of them are not very nice felonies or they not—would not be in prison. So I'd like to ask that the question and answer be struck.

MR. HOCHULI: This goes to his honesty, Your Honor. We haven't asked about the other crimes, we've just—those dealing with honesty. That's—

THE COURT: As to whether his testimony can be believed you mean?

MR. HOCHULI: Yes, Your Honor.

THE COURT: And what is the nature of what you believe the conviction to be?

MR. HOCHULI: The nature was—I mean the crime was—

THE WITNESS: Fraudulent schemes and artifices.

MR. HOCHULI: I'm sorry?

THE WITNESS: Fraudulent schemes and artifices.

MS. AIYETORO: Your Honor.

THE COURT RECORDER: Excuse me.

MS. AIYETORO: I'm sorry.

[112] THE COURT RECORDER: Tip the microphone.

THE COURT: Well, a witness is—before you speak, is allowed to be asked, and this is the first time it's been put on that basis, on a crime. But there are certain limitations of time and pertinence to the matter of credibility, and matters of that kind. But it can be put in the record for the purpose of establishing whether or not—for consideration of whether the witness' testimony is credible or not.

MS. AIYETORO: And is that the only question you're going to ask—

MR. HOCHULI: Yes.

MS. AIYETORO: —about the crime?

MR. HOCHULI: Yes.

BY MR. HOCHULI:

Q: You have admitted—you know officer—I'm sorry. You know CPO Gabbert?

A: Yes.

Q: And have you admitted to CPO—you admitted to CPO Gabbert that you have on occasion prepared bogus legal papers for other inmates for whom you were legal assistant.

A: That's incorrect. I believe he took that way out of context of what we—our discussion was.

[207] Q: Did this individual indicate—

A: Yes sir.

THE COURT: I told the reporter to speak up if anything was inaudible because on some of the prior transcripts she said inaudible and I said, don't hesitate to speak up so that's why she's doing it.

MR. ADAMS: Mr. Harris—

THE COURT: Including some for me. Go ahead.

MR. ADAMS: Thank you, Your Honor.

BY MR. ADAMS:

Q: Mr. Harris, try to speak directly into the microphone.

THE COURT: Put it a little closer towards you maybe.

BY MR. ADAMS:

Q: Mr. Harris, did this individual who you saw sign this paper that you have identified as the head of education explain to you what those tests mean?

A: Yes, he did.

Q: And what did he say?

A: He went down each line here and I asked him, what's my level and everything, I say, where am I at. He say you real low, Mr. Harris. We're going to start you over at the beginning. I said, what you mean. They got me down into college into my classification. He said,

that's all wrong, no, you ain't college level. So I got it—he went and made [208] out the paperwork and showed me what everything is.

Q: Are you—Mr. Harries, are you in school now?

A: Yes, I am.

Q: Do you have reading books?

A: Yes, I do.

Q: What is the reading book you have?

A: 2000—it's a learning—2000, I don't know the other word to it, I don't know the other word about 2000, it's a head start book.

MR. ADAMS: Your Honor, I believe Mr. Harris has indicated that he's reading level of grade school.

THE COURT: Well, what has that got to do with this record? Is that what you're getting at? I mean I'll accept what he says, but I still don't know what that has to do with this record.

BY MR. ADAMS:

Q: Mr. Harris, has—did the person who signed that record indicate to you what those numbers mean, what those numbers stand for?

A: Yes, sir.

Q: What did he say those numbers stand for?

A: My level.

Q: What level, sir?

A: My education level.

MR. ADAMS: Again plaintiffs move that Plaintiff's [209] Exhibit 302 be admitted into evidence.

THE COURT: Now that I've been told it means his education level by looking at this I don't know what that means. I don't know what his level is from looking at this exhibit. I'll let it in as an offer of proof and—I mean you can make it as an offer of proof instead of provisionally being entered because at the moment I don't understand it either, and therefore it really doesn't matter which way it goes in because I'm telling you for the record I don't know what it means. And what's the purpose of it in any event?

MR. ADAMS: The purpose, Your Honor, is to indicate Mr. Harris' low reading level.

THE COURT: And to what end?

MR. ADAMS: My line of questioning goes to legal access when he was in lock down and his requests for legal assistance.

THE COURT: Oh, I see. Well, then my ruling will stand.

MR. ADAMS: And I understand the Court's ruling is that this is being admitted as an offer of proof?

THE COURT: Well, yes, because it doesn't really matter which way it goes in. I don't understand it. I mean I take your word for it that that's what you're offering it for, but in looking at it it I don't know what it means. And I don't know that—I suppose, I don't know of any other way [210] of approaching the matter to show that he has a low level of reading except I suppose to have something like this so that—I'll just leave it up for you to figure out what to do about it.

MR. ADAMS: I would request a moment with counsel, Your Honor.

THE COURT: Yeah.

BY MR. ADAMS:

Q: Mr. Harris, at what reading level did the person who signed this document indicate that you were reading at?

A: 2nd grade.

MR. ADAMS: At this moment, Your Honor, plaintiffs will withdraw this document.

THE COURT: Okay.

BY MR. ADAMS:

Q: When you were at lock down in Douglas, Mr. Harris, did you request legal assistance?

A: Yes, I did.

Q: To whom did you make this request?

A: To the counselors in the lock down.

Q: And what happened?
 A: They didn't give me none.
 Q: Did you make a request for a legal assistant?
 A: I asked request for that too.

* * * *

[215] Q: When did that occur?
 A: That occurred January this year.
 Q: And for how long were you in lock down at Perryville?
 A: 16 days.
 Q: On the day that you were transferred to lock down did you receive your medication?
 A: I can't recall.
 Q: During that 16 day period that you were in lock down did you request legal assistance?
 A: I did.
 Q: To who did you make that request?
 A: To the counselor.
 Q: What happened?
 A: He didn't give me none.
 Q: Did you request a legal assistant?
 A: I did.
 Q: And what happened?
 A: I didn't get none.
 Q: Have you attempted to use the law library at Perryville?
 A: I did.
 Q: And what has been your experience?
 A: I asked them what to do and they can't tell me what to do.
 Q: Whom did you ask?
 [216] A: The clerks.
 Q: Did you ask for a legal assistant at that time?
 A: I did.
 Q: And what was the response?
 A: I didn't get none.
 MR. STRUCK: I'm going to object to that. It's unclear as to who was asking or who he was asking and who was telling him what. He didn't specify—

MR. ADAMS: I'll—
 THE COURT: Okay. Make it—clarify if you can.

BY MR. ADAMS:

Q: Mr. Harris, when you requested legal assistance in the law library and you indicated that you requested assistance from the law clerk is that a prisoner law clerk?
 A: It was both, the head master—the librarian and the clerk.
 Q: When you asked the librarian for assistance what was the response?
 MR. STRUCK: Objection, hearsay.
 THE COURT: Do you know the name of the librarian?
 THE WITNESS: The old lady, I don't know her name, but I got—she's still working there. She's still the librarian, the head librarian up there.

* * * *

[218] MR. ADAMS: And, Your Honor, evidence will show in fact Mr. Wilbur I believe testified on this point, that the head librarian at Perryville is Starla Cathcart.

BY MR. ADAMS:

Q: What kind of legal assistance—why were you asking for legal assistance while you were in lock down at Perryville, what for?
 A: About the medical.
 Q: Okay.
 MR. ADAMS: Court's indulgence. No further questions.
 THE COURT: When you say about the medical, you mean you wanted to have someone help you do something legally to get your medication or what? What—
 THE WITNESS: Yeah, why I ain't getting my medication, is there something there that I could do.
 THE COURT: Okay.
 MR. STRUCK: Your Honor, I didn't mean to sound obstinate before but the person who is the head of the

law library at Perryville is a man named Joe Norris, it's not Starla Cathcart and—

* * * *

[270] Q: When was the most recent time?

A: 1991.

Q: And how long—were you in detention?

A: Yes ma'am. I was in the status called administrative detention, investigative lockup.

Q: And how you were you there?

A: I was there for 30 days.

Q: Okay. And during that time could you use the law library?

A: No ma'am.

Q: What access to legal materials did you have?

A: We were supposed to kite the law library for any materials that we required.

Q: And how did this system work for you, was it satisfactory?

A: No, and it—unless you know exactly the specific policy, the specific ARS statute that you want and how it pertains to your case, unless you pretty much have a law degree, it's really of no use to you.

Q: Well when you say the particular administrative regulation or the—that you want, could you ask for it by the name? Could you say I—for example, I need the administrative policy on urinalysis testing?

A: No ma'am. You had to spe—you had to cite the specific [271] number of that policy.

Q: And did you know the number of the policy that you wanted?

A: No ma'am.

Q: Was a legal representative able to come back and see you in administrative detention when you were there last summer?

A: The last time, yes, because there was a disciplinary case pending.

Q: Okay. And did one come back to see you?

A: Yes ma'am.

Q: And was that person able to get the materials for you that you needed?

A: Not for me directly. She could get them for preparation on her own if she decided to take the case, but if I was going to represent myself, no.

Q: And so did you get the materials that you needed?

A: No, I did not.

Q: Okay. If you were requesting materials through this kiting system. Is that what they called it, a kite system?

A: Yes ma'am.

Q: How many materials at once could you request? Could you request, for example, a whole book, say of the Digest, a volume of the Digest, or a—

A: From my understanding, the latest—

* * * *

[273] * * * your ability to fight your lockdown status?

A: Yes ma'am, and my disciplinary case.

Q: Okay. Why was that?

A: Because I couldn't prepare for it.

Q: Okay. Now had you ever been in lockdown before 1991?

A: Yes ma'am.

Q: And at that time could you use the law library?

A: No ma'am.

MR. STRUCK: Objection on foundation. What time are we talking about here?

BY MS. BENDHEIM:

Q: What time in 1991? I'm sorry.

A: You're talking about prior to 1991?

Q: I'm—yes, I'm sorry.

A: Okay.

Q: Prior to 1991. In 1990.

A: In August of 1990.

Q: Okay. Thank you. And that was at Santa Maria?

A: Yes ma'am.

Q: Okay. Now when there is no pending charge against you while you're in lockdown, can you get a legal assistant?

A: No ma'am.

Q: So that if you're just in investigative lockup you can't get a legal assistant?

A: No, and that was the case in 1990. * * *

* * * *

[276] Q: And that included any appeal to the Central Office?

A: The appeal, to them, was no part of the disciplinary proceeding.

Q: Okay. And did you protest this?

A: Yes ma'am, I said—yes.

Q: Okay. Now you said that you had a street attorney, Mr. Geerlof. How did you—had he represented you in your initial criminal offense?

A: I—no ma'am.

Q: Okay. And so he wasn't your "attorney of record" originally?

A: No ma'am.

Q: And—but you decided that you needed to retain an attorney?

A: I thought it would be in my best interest.

Q: And how did you find Mr. Geerlof, had you known him before?

A: No. Just other inmates had—another inmate had used him in a disciplinary proceeding. So I felt—

Q: Mmm hmm.

A: —he was aware of the system.

* * * *

[286] CROSS EXAMINATION

BY MR. STRUCK:

Q: Ms. Booker, in your direct examination you testified that during a period of time in August of 1990 you were in lockdown. Do you recall that testimony?

A: In 1990?

Q: Yes ma'am.

A: Yes.

Q: Isn't it true ma'am, that at that point in time you were able to call an attorney yourself without having to have someone else call him for you? Let me reask the question.

A: Please.

Q: Because it wasn't clear from your testimony. I couldn't tell how you were able to contact your—this Mr. Geerlof. Isn't it true that you actually were given a call, and able to call him yourself in order to initially hire him?

A: I—there's a standard procedure for making legal phones calls.

Q: Okay. Did you place that call to Mr. Geerlof?

A: Eventually.

Q: So you did?

A: Eventually.

Q: That's a yes.

A: Yes, a yes.

Q: Thank you.

* * * *

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* * * *

[100] THE WITNESS: Okay we're talking about putting a request in on Monday and not getting the phone call until Thursday or Friday.

THE COURT: Okay.

BY MR. ADAMS:

Q: So you're talking about a four or five day delay?

A: Right.

Q: Has it ever occurred to you that a delay has caused you any harm or prejudice to your case?

A: Yes.

Q: When did that occur?

A: That occurred in January of '91.

Q: When did you make the phone call request?

A: I made the phone call request about, I think it was about eight days before I needed to call.

Q: To whom did you make the request?

A: To my counselor, Larry Balger.

Q: Were you required to provide him a reason why you needed to make the phone call?

A: Yes.

Q: Did you give him the reason?

A: Yes.

Q: What was the reason?

A: I needed to get some issues included in a supplemental [101] brief that my attorney had a date to respond on.

Q: Was this a matter that could have been handled by the mail, the legal mail?

A: Yes.

Q: Was it a matter that could have been handled by the legal mail?

A: Oh no, not at that point.

Q: Why not?

A: Because I had just received some documents under the Freedom of Information Act that we had been waiting on for some time that I needed him to include in it. I got those documents about three or four days prior to the date that he needed to file that and I was trying to get him so I could ask him to get an extension.

Q: Did you make your counselor aware of this deadline?

A: I believe I did in the kite.

Q: Mr. Coley what was the affect of that information—did that information get into the brief? Apparently it was—

A: No.

Q: What was the impact of that on your case?

MR. STRUCK: Objection, Your Honor, that calls for speculation.

THE COURT: Well I think it depends on whether he's being asked to give a legal opinion or whether he's

being asked to give something else. I'll allow it provisionally [102] subject to a motion to strike. * * *

MR. STRUCK: Yeah and also—

THE COURT: He can't give a legal opinion—what?

MR. STRUCK: Yeah, I'll also object to foundation, I'm sorry.

THE COURT: Well what's missing?

MR. ADAMS: You had indicated—

MR. STRUCK: Well first of all whether—

THE COURT: I would do that, I find it quicker than horsing around.

MR. STRUCK: —like you said whether, you know, if he's asking for legal opinion obviously that's a foundational objection. The speculation is I don't know how this particular person can say whether or not this information in here would have helped his case or not helped his case. I mean who knows why the judge did whatever the judge did.

THE COURT: Well you're speculating and that's why I said we'll have to wait and see what he's going to say and I've already advised counsel it can't be a legal opinion. So you have no problem with this, if it comes in and it's clearly error and you make a motion to strike I'll grant it, or if it should be stricken and if not I won't grant it. Okay. And there's no jury here, just me. Go ahead.

BY MR. ADAMS:

Q: Mr. Coley why were you attempting to get this information [103] to your attorney?

A: Because I needed him to include it in his supplement that he was submitting to the court.

Q: What was the information, in general terms?

A: It was an issue that I needed to have raised by him so that at the next stage if I did not receive satisfaction it would already be included in my materials.

Q: And did your attorney receive this information?

A: No, he didn't.

MR. STRUCK: Excuse me, Your Honor, could we have the name of the attorney? This is all new information to me I never heard about until just now.

BY MR. ADAMS:

Q: And the name of the attorney Mr. Coley?

A: James D. Hunter.

Q: What is the situation with regards to the confidentiality of legal calls at Cimmaron currently?

A: I don't understand your question, confidentiality?

Q: What are the circumstances around which legal phone calls are received at Cimmaron?

THE COURT: With your lawyer?

BY MR. ADAMS:

Q: With your lawyer?

A: You, if your lawyer's in Tucson then the counselor will call his office for you. If he's in Phoenix then you have to [104] submit an inmate transfer and they'll call Phoenix for you.

Q: When you're having the phone call, through your own experience, where are you?

A: In the counselor's office.

Q: Are you alone?

A: No.

Q: Who's there with you?

A: The counselor.

Q: In your experience what counselor or counselors have been in the room while you've made a telephone call? While you've been having a telephone call with your attorney?

A: Every legal phone call I ever made the counselor was sitting in the room.

Q: Can you give me—can you identify them?

A: Yeah, Freizemeyer, Ms. Calderon, Larry Balger.

Q: How close to you is this DOC staff person sitting, approximately?

A: Probably right here (indicates) on the other side of the ledge. The phone sits on his desk and he sits behind his desk.

THE COURT: Are you indicating about an arm's length away from you?

THE WITNESS: About an arm's length away.

BY MR. ADAMS:

Q: When this has occurred have you ever made a specific [105] request for the DOC staff to leave the room?

A: Yes.

Q: What room is used?

A: The counselor's office.

Q: Can you describe that room?

A: Square room with a window in front of it.

THE COURT: A window in front of it to the outside or to the corridor?

THE WITNESS: There's—to the corridor because—

THE COURT: In other words the door that you come in and out of there's a window there?

THE WITNESS: Yeah.

THE COURT: Okay.

BY MR. ADAMS:

Q: Have you ever stood outside this room?

A: Yes.

Q: When you've had an opportunity to stand outside the room can you see inside the room.

A: Yes.

MR. ADAMS: A moment with counsel.

(Pause).

BY MR. ADAMS:

Q: Mr. Coley you indicated that you had made requests of a DOC staff person to leave the room. When you've done that what has been the staff person's response?

[106] A: Mr. Freizemeyer told me the DOC policy does not allow him to leave the room when I'm talking on the telephone.

Q: Has there ever been any other response, type of response, and if so from whom?

A: Yes Ms. Calderon told me one time no, she wasn't leaving the room, inmates can't be in there using the phone without a staff present.

MR. ADAMS: No further questions.

CROSS EXAMINATION

BY MR. STRUCK:

Q: Could you tell me sir when this incident took place where you're—what time period you're talking about where this incident took place where you weren't able to get a phone call to your attorney and so to tell him about these materials you wanted included in this brief?

A: Yes that was in January of '91. This past January.

Q: Now it was my understanding that you made the request to contact your attorney eight days before you needed to call him. Is that what you told us?

A: Yes.

Q: So at—when you made the request at that time did you have the materials that you were talking about?

A: No, I didn't.

Q: How did you know that you were going to need to contact him on that day?

[107] A: I had written him and told him that I was expecting materials from ATF pertaining to the case, under the Freedom of Information Act, and that they had sent me a letter telling me that they would respond in 20 days. Okay. I did not know at that point that the mail was coming in, but I put in the phone call request ahead of time in case it didn't I could get a hold of him anyway.

Q: Did you also ask your attorney in that correspondence to request a meeting with you or a phone call with you?

A: No I didn't.

Q: I believe you also testified sir that

THE COURT: Can I ask a question about that? If you did make a request to have them, as I understand it, the prison people, to get in touch with your attorney to call you, is that allowed? Is that part of the procedure?

THE WITNESS: I'm not sure of that Judge.

THE COURT: Have you ever done that?

THE WITNESS: Yes.

THE COURT: I mean have you asked them to get you—

THE WITNESS: I have asked him to call my attorney to set up a time where we could get together since—

THE COURT: Well has that happened?

THE WITNESS: No.

BY MR. STRUCK:

[108] Q: I believe you testified sir that when you make this request for a phone call you have to tell your counselor exactly why you want to make the call. Isn't that what you testified to?

A: Right.

Q: Isn't it true that when you request a call from your counselor that you don't have to tell them the nature of the call?

A: I beg your pardon?

Q: I said isn't it true that when you request a phone call you don't have to tell your counselor the nature of the call?

A: No.

Q: Okay.

THE COURT: Are you talking now because there's a policy that you believe establishes that?

MR. STRUCK: This is impeachment, Your Honor. Counsel refer to page 33 of Mr. Coley's deposition. Line 19 of page 33 of Melvin Coley's deposition taken December 10th, 1990.

"Q: When you request a phone call, you have to say what the nature of the phone call is. In other

words do you have to say you have a court hearing in a week or I've got a motion due in a week so I need to call. Anything like that?

"A: No.

[109] Do you remember giving that, those questions and giving that answer in your deposition?

A: Sure do.

(Pause)

MR. STRUCK: I have nothing further.

MS. AIYETORO: One moment, Your Honor.

REDIRECT EXAMINATION

BY MR. ADAMS:

Q: Mr. Coley can you explain the difference in your two statements, one at your deposition when you indicated that you did not have to tell what the nature of the call was for and your statement on the stand today?

A: Yes. The difference is he asked if you had to tell him that you had a, I believe he asked if I had to tell him if I had a court date pending or something else in there and I told him no. You don't have to tell him that. What he wants to know is why do you want to call and talk to the attorney.

MR. ADAMS: I'd like to call the Court's attention to plaintiff's Exhibit marked 207, marked for identification, in fact I believe it was admitted, but my recollection is unclear.

MS. AIYETORO: It hasn't been.

MR. ADAMS: It hasn't been.

MS. AIYETORO: It has been admitted?

THE CLERK: Yes.

* * * *

[113] Q: When you came there was there anybody filling the position of resource clerk?

A: No nothing existed.

Q: Did you receive any training from the Arizona Department of Corrections to do that job?

A: No I did not.

Q: Now I want to make it clear for the record, you were resource clerk and did you have to reapply to become the law library clerk?

A: No.

Q: They just changed your title when the law library was established?

A: Yes.

Q: And you received no training from the Department of Corrections?

A: No.

Q: Have you received any training at all?

A: Yes I have.

Q: And what training is that?

A: I have a paralegal degree.

Q: Okay and when did you get that degree?

A: December 1989.

Q: And where did you get it?

A: From International Correspondence School.

THE COURT: This was while you were in prison?
[114] THE WITNESS: Yes sir.

BY MS. AIYETORO:

Q: Now this was a correspondence course, did the Arizona Department of Corrections recommend that you take the course?

A: No.

Q: Did they pay for the course?

A: No.

Q: What are your responsibilities as the law clerk?

A: I'm to assist people in locating materials and legal text that they may need to research, to provide them with forms that they may need for various legal reasons.

Q: Now is there more than one law clerk at the Florence Women's Unit?

A: Yes.

Q: And who is the other law clerk?

A: Her name is Sandra Ramos.

Q: And when was she hired?

A: Around the end of October of this year.

Q: Were you responsible at all for any training of her?

A: Yes.

Q: What type of training?

A: To assist her in the basic routine, to familiarize her with the legal materials that were available in the law library such as the forms, the textbooks.

Q: Was she familiar at all with the books before?

[115] A: Somewhat.

Q: Did—when you were assisting her did you recognize that she had certain skills in terms of law library research?

A: She could articulate very well, she was fairly intelligent so it was easy for her to catch on.

Q: So you were having to teach her basic things about the books?

A: Yes.

Q: Does she speak a language other than English?

A: Yes she is bilingual.

Q: Now have you always had a bilingual co-lawclerk?

A: No.

Q: Are there women in the yard who speak very little English?

A: Yes.

Q: And prior to the bilingual law clerk that you just talked about how would you help them?

A: Usually I would have them bring someone with them that could interpret for them.

Q: And did you ever have problems with this?

A: Yes.

Q: And what were the problems?

A: One of the problems was is that they would bring a different person with them and I would have to re-explain the whole thing. The person that was interpreting wasn't [116] familiar with the terminology I was using

or the legal part and they would have difficulty interpreting it to the person, the Spanish speaking person that came for the assistance.

Q: So that the other language primarily is Spanish?

A: Yes.

Q: Are you familiar with what is called the Muecke list?

A: Yes I am.

Q: And does the law library at Florence Women's have all the books required by that list?

A: Yes.

Q: And are they current?

A: Yes.

Q: When did this occur?

A: In May of 1990.

Q: Do you have a need for any books that are not on the Muecke list?

A: Yes.

Q: And what books are those?

A: We have, we need materials that are Spanish/English, we need materials that are self help books as far as—can I explain this?

Q: Sure.

A: Okay. A lot of complaints that inmates in the unit that I reside in would be—

* * * *

[119] BY MS. AIYETORO:

Q: Okay, so is there any other issue? You mentioned that you had a lot of Spanish speaking prisoners, is there an issue that comes out of that as well?

A: We have a lot of immigrants and they have, while they're incarcerated on a felony conviction, this is the females that I've experienced, they are being served with detainers for deportation hearings. We have no information whatsoever, I have not been able to gain access to any information dealing with deportation hearings, the defendant's rights, their appeals rights, the process, if they

have the right to have a hearing right away. We have no information on that and I haven't been able to gain any information.

Q: Now do you need the Pacific 2nd?

A: Yes.

Q: Is it, do you have it currently in the library?

A: Yes.

Q: But that's not on the Muecke list, to my knowledge?

A: Correct.

Q: Now why is it that you need the Pacific 2nd?

A: One of the reasons is, is there are a lot of cases dealing with surrounding—localize that area, California, [120] New Mexico, States to that effect with issues on it. Also, you have inmates that are Arizona, but they also have criminal charges in another State—

Q: Mmm hmm.

A: —that they're litigating at the same time. And it's hard to gain access to that material.

Q: Now have you ever had books that you had—or do you know of any books—strike that. Have you ever had books taken or know about books being taken from a law library because they weren't required by the Muecke list?

A: Yes.

Q: What is a legal assistant?

A: A legal assistant is an inmate approved by the warden to help other inmates, to assist other inmates in preparing briefs, motions, documents to the courts and to assist them in administrative hearings.

Q: Are you a legal assistant?

A: Yes.

Q: How did you become a legal assistant?

A: I submitted an inmate letter to the deputy warden.

Q: And did you have to provide or I'm sorry, did the ADC provide you with any training to be a legal assistant?

A: No.

Q: What are the differences between a legal assistant and a law clerk?

[121] A: A law clerk, an inmate law clerk receives WIPP, which is a pay program through the prison and they are to provide inmates only with assistance to books to help them research. An inmate assistant is not provided any monies through the state. They must work on—they must provide the assistance free on their non hours, their non work hours and they assist inmates in preparing their briefs or legal assistance.

THE COURT: How you get chosen to be a law clerk? Do you know?

THE WITNESS: How did I get chosen?

THE COURT: No, you are a law clerk then?

THE WITNESS: Yes.

THE COURT: Oh I thought you were a legal assistant.

MS. AIYETORO: She's both, Your Honor.

THE COURT: Both, I see.

MS. AIYETORO: The earlier testimony—do you want her to tell the Court again how you were chosen as the law clerk there?

THE COURT: No, I heard that.

MS. AIYETORO: Oh, okay.

THE COURT: She put in an application, she was approved, but I thought—anyway it's clarified.

MS. AIYETORO: Okay.

* * * *

[123] Q Do you know how many approved legal assistants are in the Florence Women's Unit?

A: I only know of myself.

Q: And in the past has there been a list of legal assistants maintained in the law library?

A: Yes.

Q: Is that list still maintained there?

A: No.

Q: And when did that happen?

A: Probably about four or five months ago.

Q: What is a disciplinary representative?

A: A disciplinary representative?

Q: Is there such a thing as a disciplinary representative?

A: Before the policy, before 30211, which is inmate access to legal assistance, years ago there was a thing called an inmate rep and an inmate rep would just rep someone in a disciplinary hearing and they didn't have to be approved because the rules of discipline state that a staff member, an attorney or a willing inmate can represent you in a disciplinary hearing. So that's kind of where that comes from. But it's not an inmate legal assistant.

Q: Okay.

A: And they don't use the terminology technically anymore.

Q: Okay. So that technically there is no such thing now as [124] an approved disciplinary representative, they're either inmate legal assistant or a law clerk or you can just do it on your own?

A: Right.

THE COURT: Is this what they used to call a jail-house lawyer?

THE WITNESS: Yes.

THE COURT: All right.

BY MS. AIYETORO:

Q: Approximately how many women request your services as a legal assistant on a weekly basis?

A: I would say an average of 15.

Q: Are you able to help all the women who ask for your assistance?

A: No.

Q: Why not?

A: I just don't have the time. I just, I have my work, I have people, I have that, I have programs, I have—I just don't have the time.

THE COURT: Have you ever requested or discussed with anyone whose name you can give us that you allow

your work to be that of legal clerk and legal assistant and not—and have that in addition to some other kind of work?

THE WITNESS: I—

* * * *

[128] Q: Now you indicated you weren't able to help all women because your, of your time restraints. Are there any other reasons why you may find it difficult to help some women? Have you had any problems in other ways?

A: Another reason is the Spanish speaking, I do not speak Spanish.

Q: Mmm hmm.

THE COURT: I meant to ask you about that. You said in the library that you need Spanish/English materials, what did you mean by that?

THE WITNESS: I mean Spanish/English text, legal dictionaries.

THE COURT: All right.

THE WITNESS: Rules of discipline, basics to where a Spanish speaking individual could come and they could sit down and they could understand what they're reading.

THE COURT: You mean the regulations issued by the prison with respect to disciplinary matters, which is what you deal with to representing—

THE WITNESS: Correct.

THE COURT: —them in those disciplinary actions,

THE WITNESS: Correct.

THE COURT: —are not in Spanish, just English?

THE WITNESS: Just English.

[129] THE COURT: Okay.

MS. AIYETORO: Okay.

BY MS. AIYETORO:

Q: Have you ever had a problem because you felt you didn't have sufficient training or knowledge?

A: Yes.

Q: Could you describe that?

A: I am—there's an inmate that I have tried to assist in doing a federal writ. She has a viable claim I just am not competent enough to help her complete that writ. Also there have been incidences dealing with defendants and their attorneys filing Anders briefs and they would come to me to help them file supplemental pleadings for their opening brief and there are many times that I just am not knowledgeable enough to help them complete it.

THE COURT: What kind of briefs?

THE WITNESS: An Anders brief.

BY MS. AIYETORO:

Q: What is an Anders brief?

A: An Anders brief, it came from I think state of California v. Anders, where an attorney filed an opening brief and requested that the Court of Appeals research the case for fundamental error based on the fact that counsel was unable to find any claims to raise on appeal. So they requested that the Court of Appeals review for fundamental errors.

[130] Q: Okay. Do you provide legal assistance or law clerk services to prisoners in segregation?

A: Yes.

Q: And what services do you provide?

A: Besides—

Q: What do you do? I mean if a person is in segregation what kinds of services can you provide that person?

A: I can provide them material if they request material from law library. Also if they have disciplinary pending or they have outside street court cases pending they can put in a kite to request to see me to discuss it with me.

THE COURT: Are you allowed to do the research for them and find the books that are pertinent to the questions that involve the particular litigation or do they have to be specific and say what it is they want before they can be given a book for withdrawal?

There's been testimony in other words that in some phases of the institution, I've forgotten exactly where, at

different times, that the inmates couldn't get books because they had to make a specific request for a specific book and they didn't know what to ask for because they didn't know what to ask for?

THE WITNESS: Right.

* * * *

[133] THE WITNESS: That's one that I can remember, you know—

THE COURT: Okay.

THE WITNESS: —right off.

THE COURT: Go ahead.

DIRECT EXAMINATION (Resumed)

BY MS. AIYETORO:

Q: Do you ever have, well you've already answered this, the Judge asked it so, are there prisoners who want legal assistance from you who have difficulty reading or writing?

A: Yes.

Q: How often per week, if you can do it on that basis, do you encounter a person who wants your assistance but has difficulty reading and writing?

A: I would say on an average about two.

Q: Can prisoners browse the shelves at the Florence Women's Unit?

A: Yes.

Q: Have you had problems with material being stolen or pages being torn out of books?

A: No.

Q: Have you ever had the need to see a medical person while incarcerated?

A: Yes.

* * * *

[158] Now one of the problems I had in the Gluth case is that I didn't have any recommendations from the prison authorities because they played the game of craps and decided they were going to put all of their defense on one

proposal, and that is that I didn't have jurisdiction. But we did persuade them to get together and they did agree on a lot of things, in spite of that. So, therefore, and a lot of the recommendations came from the special master.

So there wasn't—it wasn't too difficult to figure out something that would be likely not to cause too much of a conflict based on the record and everything, and I felt that it was important that the prison authorities play a part in it since I would like to be realistic about it and not live in a fantasy world and have the input of whatever—given whatever I might find, no matter how wrong it is, that at least it's something you believe you will be able to work with. That doesn't mean that I necessarily have to accept it but I want to be able to get such suggestions from the defendants if we get to that point, and I tell you that at this point so you can be thinking about it and not because again, I've made up my mind.

* * * *

[164] And then in the Gluth case when it wasn't done, I hired a special master to try to advise the Court as an expert—and he was accepted as an expert—as to what the Court ought to do after holding additional hearings himself in the areas covered by the lawsuit and making findings which were not challenged, I might add. And so that's how that came about.

So it's a little bit different than the general things that go around, and I won't go into any more specifics on that as to what actually happened. And I don't know if counsel is aware of that or not. You've probably been told that I'm an ogre and I'm stubborn and I only want my way. And I don't know it's ever been raised before that I've been told that before, but we've had clashes here and there's rumors to that effect in the Gazette that I'm crazy and all that sort of thing. That was about the Gluth case and I was sustained in every particular.

And I'm perfectly agreeable to having counsel tell me what I've just said in terms of what will actually work and what won't work, and even to propose if need be the

regulations that are now in effect, provided, you know, they are kept in effect if they meet some of the problems that plaintiffs have with the facts of this case.

* * * *

JANUARY 7, 1992

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[74] THE WITNESS: I'm the correctional educational program manager at Perryville.

BY MR. STRUCK:

Q: And how long have you had that position?

A: I'm starting my 12th year.

Q: What are your duties as correctional programs manager?

A: At the present time I'm responsible for all programs such as E.S.L., English as a Second Language, A.B.E. which is Adult Basic Ed for inmates who have not completed the 8th grade, G.E.D. recreation. I'm also supervising the librarians.

(Change of Tape)

THE COURT: Okay. If I can hear it everybody can.

BY MR. STRUCK:

Q: I'm just going to talk today specifically about your duties supervising the librarians. Okay? Could you tell us what past experience you had or your past educational background?

A: Okay. I have a bachelor's degree from Boston University. I have a master's degree from Boston University. I have a doctorate from A.S.U. I have been an elementary school teacher, an elementary principal. I've been a supervisor and [75] director of schools for American Samoa. I've been a grad assistant at A.S.U. and been an assistant superintendent in Peoria, Arizona and my present position at Department of Corrections, Perryville.

Q: As far as supervising the librarians, what does that entail?

A: I am responsible for—I was. Right now I'm responsible for the supervision of two librarians in the general collection and I supervise one librarian who is responsible for the law libraries.

Q: You said something about was. Have your duties changed?

A: Yes. In August of this year I—up until August of this year I was responsible for the law library at the complex level. With the new procedure that we have, the law libraries are down in the units. The law librarian still assists in the law libraries but the direct supervision of the law library itself is in the deputy warden's hands.

Q: Prior to August was there only one law library at Perryville?

A: Yes, that was located at the complex level. It was called the Complex Law Library.

Q: At some period of time other law libraries have opened at the units. Is that right, other law libraries have opened at the various units within Perryville since that time?

A: It started in January of last year. * * *

* * *

[77] * * * And that was made by A.C.I. and that took a while to be made also. But I designed it, purchased all the typewriters and tables and chairs for the unit libraries. Once that was completed the deputy wardens were responsible.

Q: Does the—do the unit law libraries contain only the materials on the Muecke list?

A: No. There's other materials but I'm not as familiar as a law librarian would be, but we duplicated a lot of forms that are needed by the inmates. And they're kept in a filing cabinet. From what I've been told we have excess material in the unit libraries. What is left over is still contained in the complex library, because we didn't have enough room or enough copies of material that was not on the Muecke list. We might have only one

set of something and that was still housed at the complex library but could be brought down to the unit library at any time.

Q: You said that you were in charge of purchasing copy machines?

A: Mmm hmm.

Q: Do all of the unit law libraries have copy machines?

A: Yes, they do. They have four brand new ones we purchased.

Q: Are there also typewriters available?

A: Yes there are. I purchased between 15 and 20 typewriters, IBM electric typewriters. They do not have [78] manuals any longer.

THE COURT: You're now only referring to Perryville?

THE WITNESS: Yes sir.

THE COURT: Well, I meant—right.

MR. STRUCK: Mr. Morse is only going to be testifying about the situation at Perryville.

BY MR. STRUCK:

Q: The 15 to 20 electric typewriters that you purchased, those are available for inmate use?

A: Strictly inmates, yes. They're placed in the library and we keep a reserve in the warehouse when one breaks, we can, you know, switch them so they're always available.

Q: Are there notary publics available at the unit law library?

A: At each unit and at the complex level, myself and the law librarian are available at any time to go to the unit but the units also have notary publics. AA's are—that's the administrative assistant to the deputy wardens are all notary publics.

Q: Is this a service that's provided the inmates free of charge?

A: Oh definitely. All services that we provide with the exception of copying is free of charge.

MR. STRUCK: I have nothing further. Thank you.

[79] MS. BENDHEIM: I have no questions.

MR. STRUCK: May this witness be excused?

THE COURT: Yes, you're excused. Thank you.

THE WITNESS: Thank you.

(Pause)

THE COURT: Are you getting, who, Starla Cathcart now?

MR. STRUCK: Yes.

(Pause)

STARLA CATHCART, DEFENDANT'S
WITNESS, SWORN

DIRECT EXAMINATION

BY MR. STRUCK:

Q: Morning.

A: Morning.

Q: Could you state your name for the record?

A: Starla Cathcart.

Q: And what is your occupation?

A: I'm the law librarian at Perryville.

Q: How long have you been the law librarian at Perryville?

A: A little over five years.

Q: What did you do before that?

A: I was a librarian at the city/county Safford City Graham County library.

Q: For how long?

A: About 14 years.

[80] Q: Do you have any other library experience other than what you've mentioned today?

A: I was a school librarian two different years, two different schools.

Q: So two years total you were a school librarian?

A: Hmm?

Q: For two years total you were a school librarian?

A: Yes.

Q: What schools were you a school librarian for?

A: The first time was up in Utah, half day of Draverton Junior High and a half day at Sunnyside High School. And the second time it was at San Manuel High School in Arizona.

Q: What's your highest level of formal education?

A: I have a master of library science.

Q: From where?

A: Brigham Young University.

Q: During the five years that you've worked for the Department of Corrections at Perryville as a librarian have you attended any seminars on law libraries?

A: I've attended one at Glendale Public Library that was sponsored by the Phoenix area Association of Law Libraries.

Q: And how long was that seminar?

A: Pardon?

Q: How long was the seminar?

A: How long was it?

* * * *

[82] week or three times—it depends on what the need is.

Q: Okay. What kind of—

A: I go to at least one of them every day and usually two or three, sometimes all four of them.

Q: What type of assistance do you provide the unit law librarians?

A: Consolation—

Q: Consultation?

A: Consultation. I can't get the T in there. I give them supplies take up—pick up requests. If they need things that they don't have down at the unit libraries, I pick up the requests and take them back with me and I fill what I can from the law library and what I can't fill then I try to get through other sources.

Q: Do you have—do your duties include responding to inmate requests for law materials from the complex detention unit?

A: Yes. I get requests from the detention unit. Usually they're given to their CPO or else an officer and they send it to me.

THE COURT: Are we talking about requests from prisoners now or staff?

MR. STRUCK: From prisoners. I'll go in—

THE COURT: What kind of requests do you get from prisoners?

THE WITNESS: Usually they want a specific case or [83] information on a subject, and I try to give, you know, to them what they ask for.

THE COURT: Do they ever ask you—

THE WITNESS: And if I don't—

THE COURT: —to advise them on where they can find what they need or something? Or can they?

THE WITNESS: You mean—

THE COURT: In other words if they—

THE WITNESS: —other places to go—

THE COURT: —have to ask for a specific book or a specific article or something like that?

THE WITNESS: I take subject requests.

MR. STRUCK: I'll just go into that area now.

DIRECT EXAMINATION (Resumed)

BY MR. STRUCK:

Q: The inmates at CDU, how quickly is the time between when they make the request and when you actually get the request?

A: Well, I can't say about when they make it and when I get it because—

Q: Okay.

A: —that varies, depending on who they give it to and when they give it to them.

Q: Can you generally tell us—

A: But when it comes to me then I usually fill it, if it's, you know, like say if I get it in the morning I try to fill [84] it by afternoon. If I get it in the evening then I try to get it to them by the next day.

Q: And as the Judge was talking before about the request itself, the inmate—if it doesn't have to make an exact—exactly specify what book they need, do they?

A: They don't have to.

Q: They can if they want?

A: They can, yeah. It's helpful if they do. But if I don't know what they want exactly, too, I go down and see them and question them and try to find out exactly what it is they need, what kind of information, and then I try to get it to them.

Q: So if you get a request that you don't—you can't really tell what it is they want, you'll actually go down and talk to the inmate to find out what it is they want?

A: Right.

QUESTIONS BY THE COURT

BY THE COURT:

Q: Are you able to deal with all of the requests you get?

A: So far. I haven't had a lot of them. And now, you know, a lot of times they ask for legal assistants so I pass that on to the units where that's taken care of.

Q: Then they do get assistance on their legal needs from other persons?

A: From inmate legal assistants. They can request to see a [85] legal assistant.

Q: What kind of legal assistant are we talking about? A jail house lawyer?

A: Right.

Q: And how about the librarians that work in the libraries, do they get assistance from them also?

A: The librarians in the units, the library officers, they take care of the lockdowns on their own units. Occasionally they may end up taking care of the ones at

CDU, but usually they take care of the ones in their units.

Q: Well, do they also take care of, in a similar fashion as you do, the requests of the inmates of what they want? You just described what you—the requests you get and how you take care of them. Do they do the same thing?

A: Pretty much.

Q: Mmm hmm. Why do some of their requests come to you instead of to the unit?

A: Well, the ones in the CDU, they're not in a unit, they're out in an area by themselves, although they have inmates from each of the units there, each of the three men's units.

Q: You mean you're explaining to me that the reason they come to you instead of going to the others is that there is no unit contact person with the CDU?

A: Right. They're not in the unit. And also it's harder for the library officers to get to the CDU to take care of [86] them.

Q: And so largely all—completely or largely the requests you deal are from the CDU unit?

A: For the lockdowns, yes.

DIRECT EXAMINATION

(Resumed)

BY MR. STRUCK:

Q: When an inmate at CDU requests materials, how many books can they have for a 24 hour period?

A: I've been taking over whatever it requires to fill their request of two to three, four books, one book, whatever it takes.

Q: And I think you just described to us the CDU is actually physically closer to you, and that's why it's more convenient for you to handle the lockdown requests. Is that right?

A: Right. And it's easier for me to get away to go talk to them.

THE COURT: Well, I understood that—

THE WITNESS: And delivered.

THE COURT: —you were doing that because they're in lockdown.

THE WITNESS: Well, they are in lockdown.

THE COURT: Well, isn't that the reason you actually take care of their requests?

THE WITNESS: No.

THE COURT: Because they can't come to the library.

[87] THE WITNESS: Right. They can't go to the library.

THE COURT: Yeah.

DIRECT EXAMINATION

(Resumed)

BY MR. STRUCK:

Q: There is a lockdown unit at San Juan. Is that right?

A: Yeah, there is a lockdown pod.

Q: Okay. Those inmates actually have physical access to the law library though there though, don't they?

A: To some degree, yes. They do have a time slot when they can sign up by kite.

Q: And they actually take them down to the law library?

A: Yes.

Q: Can you tell us what the law library hours are at the San Juan unit?

A: At San Juan they're open at one o'clock and close at nine o'clock, and they don't close at any other time.

Q: How many days a week?

A: Five, Monday through Friday.

Q: Are they ever open on the weekend?

A: I don't know if they have or not. The provision is there that if anybody needs it, it will be open for them. They'll get a clerk in there to be with them.

Q: So if someone—

A: And an officer.

Q: So if someone needs additional time to get in the law [88] library it will open up outside of the regular hours?

A: Yes.

THE COURT: Is there written policy covering all the things—most of the things you've been testifying to, about?

THE WITNESS: I think there is.

THE COURT: You don't know?

THE WITNESS: It would be a unit policy rather than the complex.

THE COURT: Well, are your duties—I know your job description is probably described, but as to what you actually do, is that also described specifically with respect to the inmates?

THE WITNESS: My job?

THE COURT: Yeah. In writing—well, I know you probably have a job description. But as to the things you've been talking about, is there any written description of what you do or what you're suppose to do?

THE WITNESS: Not totally.

DIRECT EXAMINATION

(Resumed)

BY MR. STRUCK: What about the San Pedro unit, what are the hours there?

MR. ADAMS: Your Honor, I have an objection. We have already stipulated to the law library hours at the unit libraries at Perryville.

* * * *

[90] MR. ADAMS: Again, Your Honor, I'm objecting only because—interests of time we've already stipulated to the staffing of the law libraries.

MR. STRUCK: I'm sorry, I didn't see that in there. Oh, it's in a different section? I'm sorry. It will prob-

ably be quicker for her to say them for me to try and find it. It won't take long.

THE COURT: Yeah. If he asks a question and you know it's in there just tell him and I'm sure we'll have no problem.

MR. STRUCK: I didn't see it in there. I don't know if it's the same as what I've been told.

BY MR. STRUCK:

Q: Is there a librarian at each unit law library?

A: A law officer, library officer. Yes.

Q: Library officer.

A: At least one.

Q: And these are the individuals that you—you don't supervise them but you give them assistance?

A: Right.

Q: And there's at least two law clerks at each unit law library. Is that right?

A: At least two.

* * * *

[94] describe for me the types of things you ask these law clerks?

A: Well, I ask questions like what is a citation, what is a citator. I have a question about the corpus juris secundum as to what that is. I make a list of citations and ask them to write out what each part stands for, like the page or the volume, the title and the page.

Q: And what's the purpose for doing this?

A: To test their knowledge of the books to see if they are familiar and know, you know, something about the law library and how to—

Q: Could you describe for us what a law clerk's duties are?

A: They get the books for the inmates as they ask for them. If the inmate doesn't know what book he wants then they talk to them and find out what kind of book they need and what they should look into.

Q: Okay. This is—these are inmates that are at the unit law libraries that are requesting help that you're referring to?

A: Yes.

Q: And those inmates do not have access to the stacks. Is that right?

A: No.

Q: When it was just the Complex Law Library did the inmates have access to the stacks?

[95] A: Yes.

Q: And why was that changed?

A: We had a lot of books that had pages that were cut out and some books were—come up missing.

MR. STRUCK: May I approach the witness please?

THE COURT: Pardon me?

MR. STRUCK: May I approach the witness?

THE COURT: Yes.

BY MR. STRUCK:

Q: I'm going to be handing you what's been marked as Defendant's Exhibit 834. Could you describe that exhibit for us please?

A: Okay. This is a list of missing pages I had found as—well, as the inmates found they they would come up and tell me and I made a list of the ones that were missing, the pages.

Q: And this was pages missing from books in the Complex Law Library?

A: Right.

Q: Do you know approximately when you made or prepared Exhibit 834?

A: It looks like the left hand column's missing here. I made it as I found them, as they were found.

THE COURT: When did you complete making it?

THE WITNESS: When we—

[96] THE COURT: The one that's in front of you.

THE WITNESS: Yeah.

THE COURT: When was the last entry made?

THE WITNESS: The dates aren't on here so I—

THE COURT: Approximately.

THE WITNESS: When we—well when we closed the complex library.

DIRECT EXAMINATION

(Resumed)

BY MR. STRUCK:

Q: And when was that?

A: When we moved things down to San Pedro's library.

Q: Do you know approximately when that was?

A: Probably June or July. I'm not quite sure, I don't remember.

Q: Of 1991?

A: Of—yeah.

Q: Okay.

MR. STRUCK: Your Honor, at this time I move for the admission of Defendant's Exhibit 834.

MR. ADAMS: No objection, Your Honor.

THE COURT: All right. May be admitted. Did you find it, Becky?

* * * *

[98] BY MR. STRUCK:

Q: Do the unit law libraries contain the 1991 edition of the prisoner self help litigation manual?

A: The supplement, yes.

Q: And that's all the unit law libraries?

A: Yes

Q: Are Pacific Seconds available to inmates at Perryville?

A: We have most of them up at complex. We have some in the middle, but we don't have—if they ask for ones then I usually get photocopies through A.S.U.

Q: Okay. So you have most of the Pacific Seconds, there's just a few that you don't have?

A: Yeah. Part of the 300's, the 400's and 500's and a few of the six.

Q: And if someone requests a case from those particular volumes you will contact A.S.U. law library for copies?

A: Yes.

Q: At the various law libraries, the unit law libraries, how do general population inmates get to the law library?

A: Most of them, if they—in the three men's units, if they want to go to the library they just get a pass and go to the law library. They don't have to sign up ahead of time.

Q: So they're open yards?

A: They're open yard.

* * * *

[101] DIRECT EXAMINATION

(Resumed)

BY MR. STRUCK:

Q: Before the break, Ms. Cathcart, we were talking about materials that were included in the various law libraries. Was there some material that you obtained after the attorneys went out and were working on the stipulated facts that we discussed?

A: I believe we got the Arizona form books in since then, the first two volumes which civil, the Fourth Volume which is the domestic relations and the Seventh Volume which is the criminal, and we put one copy of each of those in the units.

A: Okay. So each unit has a copy of those?

A: Right.

Q: Additionally, at the complex library isn't there additional self help manuals as well as the prisoner self help litigation manual?

A: The inmates have put together different notebooks with information in them on different subjects to help the other inmates.

Q: Does the complex law library contain the Prisoners' Rights book?

A: Yes.

Q: And does it contain a book by West on search and seizure?

A: Yes.

Q: And do you also have a book at the complex library on [102] civil actions against the United States?

A: Yes.

Q: And you also have a book there on civil actions against a state?

A: Yes.

Q: And those are all available to the unit law libraries?

A: Yes.

Q: If an inmate at a unit law library wanted to look at an inventory would that be possible, an inventory list?

A: Of their own units, yes.

Q: All they have to do is request it?

A: Yes.

Q: How are legal copies made at Perryville?

A: Generally the inmate comes in with their stuff to be copied and they—the copying is done right there. They either have or make out a money transfer then and the copy is done right then.

Q: If an inmate is indigent he doesn't have to pay for his copies?

A: No, if it's stuff going to court.

Q: And so in other words an inmate wouldn't take in some legal materials to be copied and leave them and then have to come back a day or so later, they're done right then?

A: Right. They don't have to. They may do it on their own choice.

[103] Q: Okay. But they can—they have the option of standing right there and watching the copies actually being made?

A: Yes.

Q: Are notary services available to inmates at Perryville?

A: Yes.

Q: Is there a notary at every—

A: In Santa Maria both officers are notaries. San Juan and Santa Cruz officers are both notaries. I'm a notary. And then there's also various notaries at each yard, CPOs and so on.

Q: I think Mr. Morse testified previously today that he's also a notary.

A: Yes.

Q: Earlier in this case there was an inmate named Joe Harris who testified that he talked to an elderly head librarian at Perryville. He couldn't say what her name was, but we assume that it was you. Are there any other elderly—I'm not saying you're elderly, but elderly looking is I think how he described the person that he spoke with, librarians at Perryville?

A: You say this was at San Pedro?

Q: Yes.

A: No.

Q: Do you know Joe Harris?

A: No, I don't know who he is.

[104] Q: He's an African American probably late 40s', early 50's with greying hair. Does that ring a bell for you?

A: I don't place him. You know, I don't have a face to go with his name.

Q: Okay. If an inmate came up to you and asked for legal assistance or to talk to a legal assistant what would you do?

MR. ADAMS: Objection, Your Honor. This is speculative.

THE COURT: Pardon me? I can't hear you.

MR. ADAMS: Objection, Your Honor. This is speculative.

MR. STRUCK: It's a hypothetical, Your Honor.

THE COURT: Well he's just asking what procedures she follows. I don't see anything wrong with that.

BY MR. STRUCK:

Q: Generally if an inmate comes up and asks to speak to a legal assistant or ask for legal assistance, what do you do?

A: Well, if they come in and ask for help, if they want a legal assistant, then we try to give—you know, tell them which inmates are—show them how they—tell them how they can find out which inmates are approved legal assistants.

Q: Do you know who the approved legal assistants are in San Pedro?

A: Well, I know one of them is one of the law clerks, and the other ones are posted on the bulletin board. I don't know who they are specifically.

[105] Q: Within the last month or so has there been any incident where someone matching the description I just gave you of Mr. Harris came in to talk to you?

A: Yes. Before I went on vacation earlier last month.

Q: And could you tell us what happened?

A: Well, the guy came in and he ignored the library clerks, came right up to me and asked me or told me he needed help on his medical lawsuit that he had. And so I started asking him, you know, what he had done, if he had looked at various books. And when he said he had already done all that, says, what I need is help in writing up my paper.

And so I told him, I said what you need is a legal assistant. I told him that my—the law clerk that was there was a legal assistant and the others were posted on the board and he didn't—he kind of glanced in the direction of the board but he didn't go over there. And then he just kind of shrugged his shoulders and walked towards the door and it sounded like he said something about knowing he wouldn't get any help and went out the door.

Q: And that was the last you saw of him?

A: That's all—yeah.

MR. STRUCK: I have nothing further.

CROSS EXAMINATION

* * * *

[107] MR. STRUCK: I'm going to object, Your Honor. Is he referring to Perryville?

MR. ADAMS: I'm referring to Perryville. That's correct.

THE WITNESS: Do they give them any training, DOC?

BY MR. ADAMS:

Q: Yes, training in law library science or legal research.

A: No.

Q: And isn't it true that these CSOs who will be handling or running the unit law libraries will have responsibility for training the law clerks or supervising the law clerks who are there?

A: They supervise them. Yes.

Q: And isn't it true that the law clerks have not been provided any training in legal research?

MR. STRUCK: Going to object. That calls for speculation. From who?

THE COURT: From anybody I guess.

MR. ADAMS: From the Department of Corrections.

MR. STRUCK: My objection is calls for speculation.

THE COURT: Okay. Department of Corrections.

THE WITNESS: I don't know what training they may have received prior to coming there.

THE COURT: No, Department of Corrections.

THE WITNESS: I don't know.

[108] THE COURT: You don't know whether they did receive—

THE WITNESS: They don't have anything at Perryville, but I don't know what—

THE COURT: Okay.

THE WITNESS: —before they come to Perryville.

BY THE COURT:

Q: Well, how about in your experience with them, do you find that they're able to find subject matter in books like you are?

A: Most of them are.

Q: Mmm hmm, do you know how they attained that ability? Do you personally know?

A: A lot of it they've done by doing.

Q: Have you trained them at all or done anything with them?

A: I talk with them. I find out—I know pretty much what they've done when I—after I've given the test, what they know and I try to fill in the blanks.

Q: From what knowledge you previously acquired did you make up the test?

A: Pardon?

Q: How did you acquire the knowledge that you use to make the tests?

A: Just reading in the books myself and—

Q: Which books?

[109] A: The—I have the little copy—photocopy of a pamphlet that was put out in California on how to use the law library. The West puts out their little help books on how to do things and we had a book on how to do research in the library.

Q: Okay.

CROSS EXAMINATION

(Resumed)

BY MR. ADAMS:

Q: Ms. Cathcart, isn't it true that on occasions prisoners have told you that they cannot read, prisoners who are in the law library at the complex have informed you that they cannot read?

A: A couple of them have.

Q: And isn't it also true that—strike that question.

QUESTIONS BY THE COURT

BY THE COURT:

Q: Do you have people who don't speak English in Perryville?

A: There's a few I think.

Q: Well, that would include them I expect. And how many years have you been at Perryville now?

A: About five.

Q: And there have been two prisoners that couldn't speak English?

A: There was only two that—

Q: Or read English?

A: —you know, that told me that they've had trouble.

* * * *

[112] A: Well, San Juan opened in December of '90 and Santa Cruz in I think it was in February, Santa Maria in March and San Pedro I think we opened in June, July or August, somewhere along there.

THE COURT: Of '90?

THE WITNESS: '91.

THE COURT: '91.

BY MR. ADAMS:

Q: Isn't it true that prisoners who are in lockdown may keep their materials for longer than 24 hours only because there are not enough people at the complex staff to retrieve the material?

A: If we don't go pick them up then they end up with them longer.

Q: Is that a yes?

A: Yes.

Q: Isn't it true, Ms. Cathcart, that it may take a week or longer for a prisoner to get his materials to lockdown once he's requested them?

A: It's possible, if I don't get the request.

Q: Isn't it true that has occurred?

A: It has.

Q: Isn't it also true, Ms. Cathcart, that you get requests from prisoners who are in lockdown that are unintelligible?

A: Repeat please.

* * * *

[115] THE COURT: Oh, I must confess we get some of them too.

BY MR. ADAMS:

Q: Ms. Cathcart, you mentioned in direct examination that you provide law clerks with a test which you developed. Is that correct?

A: What was the—

Q: You've developed a test that you give law clerks.

A: Yes.

Q: Is this test provided or done statewide or is it—

A: It's when I—

Q: —departmental—exclusively for Perryville?

A: Yes, it's one I've done.

Q: To your knowledge are legal assistants required to take this test, or do you offer it to them as well?

A: Not that particular test as far as I know.

Q: Is there some other test?

A: I don't know anything about what happens to them or how they choose the legal assistants. I don't have anything to do with it.

THE COURT: Who chooses them?

THE WITNESS: It's the deputy wardens approve it by policy.

BY MR. ADAMS:

Q: Isn't it true that law clerks are not allowed to do legal [116] research or write prisoners' pleadings?

A: Law clerks, while they're on the job?

Q: That's correct.

A: Yeah. That's correct. They don't.

Q: And a law clerk is a job, correct?

A: Yes, a law clerk is a job.

Q: In your direct examination you described an incident when you spoke to an Afro American prisoner at Perryville. You don't know whether or not the prisoner is Mr. Joe Harris, do you?

A: I do not know if that was him.

Q: No further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. STRUCK:

Q: The two inmates that you said walked up to you and said that they couldn't read, were they requesting help obtaining legal materials?

A: The one I remember best, he was sitting at a table with a book open and he asked me to read what was there, telling me he couldn't read and I really didn't know whether it was true or if he just wanted me to read it to him.

Q: Did you read it to him?

A: Yes.

Q: How about the other inmate, was he requesting legal materials?

[117] A: I think he was also asking me to just read what he had.

Q: Have these two inmates ever requested legal materials on other occasions?

A: I don't recall.

THE COURT: I suspect this matter could be handled quite simply by finding out at intake, I'm sure they determine whether someone can read and write, and there must be a percentage of that. I would think they would do it. I don't know whether they do it or not. If they do I would be interested in knowing that, what percentage of the prisoners in the general population, or a break down in some way if they have those figures what the figures are on illiteracy.

BY MR. STRUCK:

Q: Isn't it true when you were talking about the training of clerks you said there wasn't any formal training, isn't it true there is some informal training that goes on that's provided by you to the clerks?

A: Yes, I talk with them, answer their questions, tell them as much as I know as to the process to go to find material on the various subjects.

Q: When you get a request from an inmate in lockdown for legal materials that's unintelligible, what do you do?

A: I usually go talk to them and try to find out what it is they need and what it is they're working on.

Q: Okay. Thank you. Nothing further.

* * * *

[150] THE COURT: Right here, right here. She'll swear you in.

ANN REEDER TYSZKIEWICZ,
DEFENDANT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. STRUCK:

Q: Would you state your name please?

A: And what is your—

THE COURT: You can pull your chair up a little bit, then you won't have to go back and forth.

THE WITNESS: Yes sir.

THE COURT: Thank you.

BY MR. STRUCK:

Q: What is your occupation?

A: At the current time I was just reassigned as a CPO one at East Unit in Florence.

Q: At any time were you assigned to the SMU law library?

A: Yes sir, as an administrative assistant three.

Q: And when was that?

A: That was from approximately July 15th, 1990, till just about three weeks ago.

Q: Could you tell us your educational background please?

A: My educational background is an associate of arts degree in business and a bachelor of arts degree in English with a minor in history.

Q: You have any—have you gone to any seminars or anything [151] regarding law libraries or received any training in that regard?

A: Yes sir, I have.

Q: And what was that?

A: That would be the department usually every summer offers an educational and library seminar offered at different locations through this state. All the law librarians assigned to the different units meet and do some training regarding law libraries. There was one last summer I believe in July, think it was in July, and the year before that it was in June.

THE COURT: Who conducts the training? Who are the teachers in other words?

THE WITNESS: It's usually coordinated by Jenny O'Leary who is director of library services for ADC. She has brought in outside speakers.

THE COURT: Do you know who they are? Do you remember any of them?

THE WITNESS: No sir, that would be available through brochures.

THE COURT: No, I wondered if you remembered any.

THE WITNESS: No right now, I'm pretty nervous. I'm not remembering a lot of things.

THE COURT: Well, were they university types of teachers or what?

[152] THE WITNESS: In one circumstance at the Arizona State Library Association Conference, not this year, the previous year in Phoenix there was, I can't think of her name, Brenda Vogel who was librarian of the year

and she's director of correctional libraries for the state of Maryland for example. Different types of people with areas, people within ADC who deal with law libraries, Gail Parin. I believe Mr. McDonald has spoken at one or two of them.

BY MR. STRUCK:

Q: And you attended two of these seminars?

A: Yes sir. They're an annual training event.

Q: Is that a one day—

A: It's usually three days.

Q: Three days? What were your duties at the law library at SMU?

A: The overall operation of the SMU law and lending library, that included supervision of two security officers, just recently up to eight inmate clerks, although they weren't directly under my supervision I was responsible for their actions: scheduling, law library turnouts for the law library, coordinating with the shifts to have escorts available to and from, doing all the lending library procedures, issuing indigent legal supplies, running photocopies of materials for inmates, answering grievances for inmates regarding law library. Sort of a catch all for [153] anything that had to do with the library.

Q: As far as the actual materials that were contained within the law library, we stipulated to certain facts but there's some things that are in addition to that that I would like to go into. The law library at SMU had a prisoner self help litigation manual. Is that right?

A: That's correct, sir, multiple copies.

Q: And what—do you know what year that supplement was?

A: I sent for the most recent edition earlier this year. Due to the custody level of our unit oftentimes inmates tear up books, remove pages, sort of an ongoing process of updating the books, getting new copies.

Q: So you had more than one copy then of that manual?

A: Yes sir.

Q: You had, did you say three?

A: I believe I had three. I had two right out on a shelf and I kept one for a master. Earlier this year we had one, and this wasn't through neglect by anybody, they're just bound sort of dry, a whole bunch of pages fell out and et cetera, so we had to replace it.

Q: And that was the '91 supplement that you had?

A: Yes sir, I sent for the most recent copy they had, and they sent me a supplementary pamphlet along with it for any new information outside of their last published edition.

Q: I believe you just testified that part of the staff that [154] you supervise included eight legal clerks. Is that right?

A: Well, they were referred to as law library clerks as opposed to legal clerks, yes sir.

Q: Okay.

A: And three of those would be classified as lending library clerks.

Q: And were—did they all work during the same times or did that vary?

A: That varied, sir. Five of them, like I said, I gained another position so I could cross train someone in both areas. But five of them would be there from 7:00 to 3:00 during the day and the other three would come in from 12:00 until 8:00 in the evening.

Q: Inmates at the SMU law library don't have access to the shelves. Is that right?

A: That's correct, sir.

Q: And do you know why that is?

A: It's a very high custody level, and in order to facilitate the most people using the library that they can at a time, two I-5 custody level inmates at our institution can't be in any common area at any time, restrained or unrestrained. So in order to use a library to it's fullest we

had six individual stalls so that we could use it six times as much.

Q: And how does an inmate that's in one of these stalls [155] obtain legal materials?

A: They come up to the law library and speak with us. We give them a list so they can write down the books they need, the materials they need, what they're researching.

QUESTIONS BY THE COURT

BY THE COURT:

Q: In other words they tell you the subject matter they're interested in or what kind of an action they want to bring or the factual problem they have and then you give them the books that might be pertinent to that?

A: Yes sir, it varies. Some of the inmates were completing paralegal training courses and had very specific outlines for their studies and they would come down asking for specific materials.

Other inmates were rather well versed through their own experiences in what they were doing and were acting as legal assistants for the unit, and they were pretty, like I said, well versed. Some came up researching disciplinary topics only, involving internal disciplinary proceedings. And then we did have inmates that were coming up starting a general area of study in their topic.

Q: In other words if they come there, they don't have to have the name of a specific book, or do they?

A: No sir, it depends what area they're starting from. Some people are sort of confused. We usually try and refer them [156] to the legal assistant program if they don't know what direction they want to go. Some people are just curious. They come down and we can usually try and guide them through whatever topics they're looking at towards whatever kind of direction they want to look so they can see the types of cases that have occurred in that area.

Q: Mmm. hmm. Do you have any books that generally you find aside—you know, I'm not talking about the individual books that have law decisions printed in them, do you find any books especially helpful?

A: Yes sir, I think the Prisoner Self Help Litigation Manual is extremely helpful to a lot of inmates. There was an inmate who had taken his California Bar exam and completed correspondence courses. That was Dave Mann. And had written—would write a column in a publication called LaRocca, as well as publishing other information such as conflict resolution, different topics to help guide inmates in their studies.

We put together an introductory manual to—use of the law library and legal research so that when someone came up and were starting their research they could use that. We also acquired other books, the law library at North Unit has a deal with the Federal Court Building that he picks up the surplus books—

Q: Yeah. I've contributed to that.

[157] A: And any time we can find some that we think might be helpful, we get a lot of questions or inquiries on that topic, we try to make that book available in the library.

Q: Do you find any books, and I'm not looking for trouble now, I'm just trying to get information.

MR. STRUCK: No, you're doing a good job, Your Honor.

BY THE COURT:

Q: Do you find any books that are—that you know of that ought to be there and not? You can say it. I don't think anybody's going to fire you. If they do, just tell me and we'll take some action on it.

A: One specific book I think would be helpful would be like a federal case citator. Currently we use the Table of Cases for the Modern Federal Practice Digest Series and I—

Q: Federal case citator?

A: Yes sir. I think it would help the staff as well as the inmates to locate the federal cases a little bit more easily.

Q: I'm not even familiar with that book. What is it actually?

A: It's basically a table of cases for federal cases. When you look up in the Modern Federal Practice Digest and West Federal Practice Digest Second, Third and Fourth you can look under the table of cases but it's rather limited to something, how it's treated. * * *

* * *

[162] THE WITNESS: 1987.

THE COURT: Huh?

THE WITNESS: 1987.

THE COURT: 1987. There's been so many of them I keep—I told you before, the original one, I was telling Tom Tang again, I met him downstairs. You know we're still talking about—I am naturally, about the time you were chairman of a committee and that was when you were in private practice before you were a superior court judge, before you were an appellate court judge and before you were retired appellate court judge. The bar formed a committee at my request and he was the chairman of the committee to work out a library, the first library that they had. That was a long time ago in the 60's. Go ahead.

BY MR. STRUCK:

Q: How are—when you were at SMU how were copies made for inmates?

A: On the photocopy machine.

Q: Okay. What was the procedure if an inmate wanted to have legal copies made?

A: There's two different ways an inmate could do that. One is he could seal his items in a manilla envelope and send it to the law library. Some of them work in their own cells and send the materials down to us with

an inmate communications, [163] we call a kite inside of it, saying I need x amount of copies, could I please have them collated, stapled, whatever. We'll go ahead and run them and usually return those to them within 24 hours.

Also when an inmate is at the law library they can request copies. We usually try and hold them to the amount that's required for the courts along with a copy for their personal file. And we've got a list of what's required by the courts for them to file, otherwise we might be running off too many copies.

Q: Who actually does the copying?

A: The officer will take the photocopy work from the inmate and scan it for contraband. Periodically something will be stuck in the context of the—of all this work that he shouldn't have photocopied like stationary, something like that. We would scan it for contraband, give it to our inmate clerk and our inmate clerk then puts it on the photocopy machine, logs the inmate's name and number, the date, how many copies were run, whether it was case law out of a book and whether or not it was indigent, and whether or not he was paying for it and whether or not it was court documents so that we could differentiate at a later point.

Q: Did you supervise the inmates that were copying, periodically?

A: Yes sir.

[164] Q: And would the inmates actually read the documents?

A: Not unless they attended the Evelyn Woods speed reading course.

Q: Why is that?

A: There's a collator you could set up to 50 sheets at a time in the top of the photocopy machine and it feeds from the bottom.

Q: It's an automatic feed?

A: Yes sir.

THE COURT: Why don't we take our afternoon break?

THE BAILIFF: All rise.

(Recess at 2:46 p.m.)

THE BAILIFF: Court is now in session. You may be seated.

DIRECT EXAMINATION

(Resumed)

BY MR. STRUCK:

Q: Ms. Tyszkiewicz, what type of training did you give the law clerks? Strike that, did you give the law clerks any type of training at SMU?

A: Yes sir.

Q: And could you explain what you did?

THE COURT: Why don't you pull your chair up again then you won't have to bob back and forth. You'll last longer.

BY MR. STRUCK:

[165] Q: Could you describe for us the training that you gave the law clerks at SMU?

A: Recently it was a little bit more static than it was in the past. We had inmates turn over but more recently we've been able to bring in a new clerk and cross train him in the lending library and law library as well. So that way when a position became vacant, I wasn't left in the lurch without a clerk and he was trained in both areas.

We have a library instruction manual talking about what we can and cannot do in the library, sort of an adaptation of the policies in plainer language. When the officers are assigned to work for me I have them read it, sign it, date it, you know, for purposes of understanding. I make that available to the inmates. I encourage them to usually read the self help litigation manual, Introduction to Basic Legal Research. Usually when I get a new clerk I'll take them through an inventory of the library.

It's usually very helpful in showing them all of the books that are available, how they're updated, a lot of on the spot things. In a situation like that you have a lot of circumstances that come up once every six months. If something like that happens bring everybody over, explain it through, encourage them to use for example West puts out a number of pamphlets, how to sheperdize, you know, use of the different books, to read those, ask questions.

* * * *

[169] THE COURT: Oh, I see. That's what confused me a little bit. Okay. I got the Reeder right but when you were asking her about the name I thought maybe it was a middle name or something, but it's a married name?

THE WITNESS: It's usually so difficult to pronounce my last name I have everybody call me Reeder.

BY MR. ADAMS:

Q: Miss—may I call you Reeder?

A: You got it.

Q: That would make life a lot easier for me. If you're not uncomfortable doing it. Ms. Reeder, you've become acquainted with prisoners who are illiterate who are attempting to use SMU law library. Isn't that correct?

A: Yes sir.

Q: And haven't you recommended that prisoners who are illiterate who are attempting to use the law library at SMU who have attorney of record get legal assistance through a legal telephone call with their attorney?

A: Depending on the circumstance, yes sir.

Q: But isn't it correct that you have recommended that the prisoner receive legal assistance by talking to his attorney by the telephone?

A: Yes sir.

THE COURT: In other words right now they can't, [170] unless they have a schedule of some kind and it's prior approved, they can't talk to their lawyer on the phone?

THE WITNESS: I believe it's contingent upon the individual cases. I just recently started in a job that handles those and I know just in the three weeks that I've been in my new position, I've probably run four attorney phone calls for points of clarification, needing to meet with them, arranging a visit, things of that sort.

THE COURT: I guess I was just trying to get some free legal advice. I've got another case in there which came in this week where the prisoner's complaining he can't arrange for a phone call to his lawyer. He's got a lawyer, so I don't know what it's all about.

BY MR. ADAMS:

Q: But isn't it correct that your recommendation is based on the fact that the prisoner is illiterate and a law book alone does not help him?

A: Yes sir.

Q: Isn't it—

THE COURT: Well, excuse me one minute. Is there ability to have prisoners call their lawyers? Wouldn't that—you don't have enough phones for that, do you?

THE WITNESS: The reason why it's usually a scheduling problem is, is that we have different people wanting to call them. Sometimes the attorney doesn't want [171] the inmate to call them. That's sometimes the case and we have to honor the attorney's wish along the same lines.

THE COURT: Yeah, when I was in private practice I've thrown clients out of my office, you know, trying to say—bug the heck out of you.

THE WITNESS: Yes sir.

BY MR. ADAMS:

Q: But isn't it correct that the need for a prisoner to have to define an emergency, an illiterate prisoner to define an emergency in order to contact his attorney by phone, goes against your rationalization for why this

illiterate person needs to speak to his attorney by phone. Isn't that correct?

A: I'm not sure I'm understanding your question.

MR. STRUCK: Yeah. Objection, Your Honor. That question is unintelligible.

MR. ADAMS: I'll try and make it more simple.

BY MR. ADAMS:

Q: Isn't it correct that—are you familiar with the phone policy?

A: Yes sir.

Q: And isn't it the phone policy at SMU that prisoners have to indicate that they have a deadline or an emergency in order to get a legal phone call?

A: Yes sir.

[172] QUESTIONS BY COURT

BY THE COURT:

Q: Can the lawyer request of the prison that the prisoner be allowed to call him?

A: The attorney can notify the inmate in writing.

Q: And then what?

A: That they would like them to call them at such and such a time.

Q: And then what does the inmate then do, or prisoner?

A: The inmate then notifies his assigned correctional program—

Q: And shows them the letter?

A: Yes sir.

Q: Then they allow them to do it?

A: Yes sir.

THE COURT: That's where I am on this case, they haven't allowed him to do it, he says. I don't know if it's true or not.

CROSS EXAMINATION

(Resumed)

BY MR. ADAMS:

Q: Isn't it correct, Ms. Tyszkiewicz that a prisoner who is illiterate cannot use the mail?

A: I would assume so, sir.

Q: And therefore isn't it correct that that policy, the one that you've just described, would not cover the need of an [173] illiterate prisoner who needs to contact his attorney for legal advice. Isn't that correct?

A: I would like to give a short explanation to that if I may. Recently there was an inmate who stated to us that he was illiterate. Sometimes it's a real difficult situation, if someone can't read and write, for them to admit that to a lot of people. He came down and discussed the situation with us.

Because of his special need he couldn't then send us written communications to come to the law library. He set himself up in a whole bunch of different problems. So I went to the deputy warden and I asked his approval to go ahead and submit kites for days a week for this inmate, and to have one of my law clerks who also happened to be a legal assistant when this inmate came down to have conferences with him in order to read his communications and help him communicate better. Special circumstances can be taken when the inmate notifies the people of his special needs. If he doesn't tell anyone that he can't read, it's often difficult for somebody to make that presumption for him.

THE COURT: Do you have the discretion to do what you did?

THE WITNESS: It's just a personal philosophy for my job, sir, and how I chose to do it.

* * * *

[184] THE COURT: Yeah. But that's the question I asked you twice that you didn't hear.

MR. STRUCK: I'm sorry. I misunderstood you.

MR. ADAMS: There is foundation, Your Honor. This witness testified that she refers prisoners to the legal assistant program. That's the—

THE COURT: Well, I'm not going to take his word anyway, but find out what knowledge she has. I don't mean because I don't want to but because I think he's entitled to ask her since you're not a witness. Go ahead. Ask her what training.

BY MR. ADAMS:

Q: Are you familiar with the legal assistant program?

A: I'm familiar with it but I do not supervise it. It's handled by the disciplinary department at SMU.

Q: Does your familiarity include knowledge of the training of prisoner legal assistants?

A: At our particular unit there's no specific training. It's offered at other units.

THE COURT: Well, I mean in dealing with legal assistants do you find that they know anything about law?

THE WITNESS: Oftentimes due to the disciplinary nature of our unit they've spend quite a bit of time at other units before they came to ours. A number of the inmates have been privy to the legal training program they offered [185] regarding the Gluth decision at Central Unit, personal research of their own. There's inmates at SMU that participated in the legal correspondence school, legal assistant—just a minute, paralegal correspondence programs.

As far as you know personal recording of their programming, anything like that, I wouldn't be responsible with that, but through conversations with the inmates and contact with them I know that many of them have been allowed to participate in those programs

THE COURT: Well, are you comfortable with someone who has seen to the legal needs of inmates, with sending them—having them go to to a legal assistant to get legal advice?

THE WITNESS: Oftentimes yes because—

THE COURT: Sometimes yes and sometimes no probably.

THE WITNESS: Sometimes—

THE COURT: Depending on the training and background the legal assistants have, right?

THE WITNESS: And depending on how the inmate is approaching it. Some of the inmates don't have a pressing legal issue, they're just curious. And in that respect you can start them and you can have them spend the time reading and understanding and learning and progressing from there. If it's someone who has a dire need you're going to put them through to a legal assistant immediately and suggest that [186] they contact their attorney of record so that they can exercise all the rights afforded to them.

MR. ADAMS: No further questions, Your Honor.

THE COURT: Thank you.

MR. STRUCK: Nothing further.

THE COURT: All right. You may step down. You're excused then. Thank you.

* * * *

[251] THE COURT: Why don't you pull your chair up then you won't have to—

THE WITNESS: Okay.

THE COURT: —lean forward all the time and you won't—

THE WITNESS: Thank you.

THE COURT: Thank you.

BY MR. STRUCK:

Q: And how do you go about ordering items?

A: Well, if a volume is reported missing or some destruction done to it, the unit will call me and I'll put in a PR or a PO for that volume to the publisher for that unit.

Q: And do you also find out about missing volumes through inventories?

A: Yes we do.

Q: And do you also order new volumes based on inventories?

A: Right. Yes, we do.

Q: There's been some testimony that there were some missing volumes at the Rynning law library. Are you familiar with those missing volumes?

A: Yes sir.

Q: And how did you become familiar with those missing volumes?

A: Well, CSO Powell informed me that all the books—

MS. BENDHEIM: Objection, hearsay.

* * * *

[261] Q: Of 1991?

A: Of 1991.

Q: Before I forget, have you had any training at all in law libraries or law library supervision?

A: We went through a nine week course in Central Unit. It was set up for the inmate legal assistants and the law library supervisors also participated.

Q And when was that?

A: Believe that was in January of '91, January or February. Not sure of the month.

Q: And what did this training course entail? Do you recall?

A: It was a very basic introduction to law, constitutional law and some post conviction law.

THE COURT: Who gave the course?

THE WITNESS: Your Honor, I don't remember her name.

THE COURT: Where was she from?

THE WITNESS: That I'm not certain of either, sir.

THE COURT: Was she on the staff of the prison or was she from the outside?

THE WITNESS: No sir, I believe she taught—I believe she was involved with legal services on some Indian reservation or she started that course up there. I really am not certain on her legal background or—

THE COURT: In other words she was a lawyer?

[262] THE WITNESS: She was an attorney. Yes sir.

THE COURT: Okay.

BY MR. STRUCK:

Q: About approximately how many inmates use the Rynning unit law library per day?

A: I would say between 50 and 60.

Q: How many can use the law library at one time?

MR. FATHI: Objection, Your Honor. We were told that this witness would be coming to contradict one specific allegation made by John Doe I, prisoner witness in his trial testimony. This is far beyond the scope of that. And in spite of Your Honor's previously expressed views that perhaps we're too liberal—

THE COURT: No, I just didn't want to spend a lot of time on the other matter, as to whether it was within the scope, was out of the scope. That would have had more questions and all the rest of it. Why are you going beyond what you talked about doing?

MR. STRUCK: Because, Your Honor, the Rynning Unit Law Library was never discussed by the plaintiff's legal access expert, Mr. Wilbur, because he never visited due to the fact that it's so recently opened. And defendants didn't anticipate there was going to be any testimony at all about this particular law library until the plaintiffs had John Doe I discuss the Rynning Unit Law Library, which was not * * *

* * * *

[264] THE COURT: Well, I suppose there's enough time for you, if you want to, if you feel that any of this is a problem for your side to dig into it and present it in rebuttal.

MR. FATHI: That's fine, Your Honor.

THE COURT: And since there was no testimony about this place at all it can be useful either way. So he would be allowed to do it too if he wants to bring anything up. So you go ahead.

MR. STRUCK: Thank you.

BY MR. STRUCK:

Q: What are the hours currently at the Rynning Unit Law Library?

A: We're open from seven o'clock to 8:15 at night.

Q: And how many days a week?

A: It's five days a week Monday through Friday.

Q: If an inmate wanted additional time and wanted to get it in the weekend, would he be able to.

A: No, he would not.

Q: If he has a court deadline can he get additional hours in the law library?

[265] A: Yes, we reserved evening hours for inmates that have court deadlines, also inmates that are day workers that are—would have a difficult time accessing the law library facility.

Q: How many law clerks are on your staff?

A: I currently have five law library clerks on my staff.

Q: And are any of the law clerks Hispanic?

A: Two are Hispanic.

Q: And they speak Spanish?

A: Yes, they do.

Q: If an inmate wanted to know what was in the law library would they be able to review an inventory list?

A: If they so requested I would have no objection to them looking at it. I have not been asked by an inmate to see the inventory list.

Q: How are copies made at the law library?

A: The inmate normally hands his copies that he wishes to be requested to my copy clerk or to any other

clerk that's on hand or not busy at the time, and the clerk will then copy the legal material.

Q: Is the copy machine in plain view?

A: The copy machine is in very plain view. The inmate can watch—well he transfers the legal documents to the inmate that's copying and within four or five feet is the copy machine in plain view of the inmate.

[266] Q: Do you have notaries there?

A: Yes.

Q: How many notaries do you have?

A: Myself and Officer Woods. I work the evening shift, Officer Woods works the day shift.

Q: That's five days a week?

A: Yes.

Q: Do you know how many legal assistants are available at the Rynning Unit?

A: There's approximately 11.

Q: Do inmates that are in lock up at the Rynning Unit have an opportunity to physically access the law library?

A: Yes, they do.

Q: And how do they go about getting—making a request to get into the law library?

A: They would submit a request with an inmate that's not on lock up and there is a period reserved seven o'clock to nine o'clock Monday through Friday, Friday would include nine o'clock to 11 o'clock for a total of 12 hours per week.

MR. STRUCK: Your Honor, may I approach the witness?

THE COURT: Yes.

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* * * *

[130] Q: Do you have any idea what he spent those items (sic) on?

A: No I don't.

Q: If Mr.—

THE COURT: Is there a policy that somebody can tell us about with respect to how much they can—it says on here a \$40 limit, and are there any other limits? They may spend up to that amount?

BY MR. STRUCK:

Q: Could you tell us what the dollar amount is to be an indigent, to get legal supplies?

A: To get legal supplies you can't have \$22 on your books within a 30 day period.

Q: Okay. And because Mr. Bishop had \$25 on the books he was taken off the indigency status?

A: That's correct.

Q: And would he be able to reapply for indigency status?

A: I believe on January the 9th, I believe.

THE COURT: In other words, 30 days from the day he got the check?

THE WITNESS: That's correct. If he spent it on the 6th or the 9th. I don't remember which day he spent it on.

BY MR. STRUCK:

[131] Q: So that would be 30 days from when his account went above \$22?

A: That's correct.

Q: Have you had an opportunity to look through this particular list and calculate personal hygiene items?

A: Yes I have.

Q: As far as the cost? Could you tell us which personal hygiene items you listed in your calculations?

A: I marked an X on what I would consider basic personal hygiene items for—and it came out to \$8.05.

Q: What items did you mark an X on?

A: I marked Irish Spring soap, Suave conditioner, Suave shampoo, toilet paper, toothbrush, toothpaste, and a roll-on deodorant.

THE COURT: We were told by a prior witness who's a dentist in the institution that inmates were provided toothbrushes and toothpaste free. Is that the truth?

THE WITNESS: On indigency.

THE COURT: No, he didn't confine it to indigents.

THE WITNESS: I'm not sure.

THE COURT: But indigents are?

THE WITNESS: Yes.

BY MR. STRUCK:

Q: Do you know if toothpaste and toothbrushes are provided inmates upon intake?

[132] A: Yes they are.

THE COURT: I hope they don't have to have it for 30 years. I think they recommend that you get rid of them every six months, not that I do that, but I get rid of them when they get ragged.

BY MR. STRUCK:

Q: If Mr. Bishop testified that he purchased coffee, shampoo and soap, could you calculate for us quickly what that would amount to?

MS. AIYETORO: Could you give us the page number you're referring to on this testimony?

MR. STRUCK: Just a second.

THE COURT: It's right on the first page where the X is—

MS. AIYETORO: No, no. He referred to the prisoner's testimony—

THE COURT: Oh, I'm sorry.

MS. AIYETORO: —and I want the page number.

THE COURT: Excuse me. I didn't hear.

THE WITNESS: Should I answer?

THE COURT: Pardon me?

THE WITNESS: Can I answer?

THE COURT: Yeah, do you know the page number?

THE WITNESS: No, on that I know what the approximate cost would be.

[133] THE COURT: Well I think you better wait until he finds what he's looking for. The question included something that they wanted to know what page it was on, so we might as well wait until they find it.

(Pause)

MR. STRUCK: I believe it's on page 154, December 17th transcript.

THE COURT: Okay, they got it.

BY MR. STRUCK:

Q: Could you calculate for us how much coffee, shampoo and soap would have cost?

A: It would be approximately about six dollars.

Q: Thank you. Mr. Bishop is a legal assistant is he not?

A: Yes he is.

Q: As a legal assistant is Mr. Bishop eligible to get indigent supplies for the people that he does work for?

A: If they're indigent, yes he can.

Q: Thank you. I have nothing further.

* * * *

[136] Q: Have you ever added up what persons could buy that were kind of basic things, like soap and shampoo, and cigarettes, and maybe a couple of candy bars, not extravagant items, to find out how much a person could spend without really, you know, being extravagant, and compare that to the indigency. Have you ever done that?

A: Mmm hmm.

Q: And what did you come up with? I'm sorry, did you say you had done that?

A: Yes I have.

Q: I'm sorry. And did you come up with a figure?

A: It's about \$20.

Q: About \$20. So that would mean a person had two more dollars left if they got \$22 in their account?

A: That's correct.

Q: I see. You indicated that a person, once they get above \$22 in their account, would be taken off for 30 days. When do you start calculating the 30 days? I'm not sure I was clear on that.

A: From the date that they had the \$30 (sic) on their account.

Q: Okay. So—

A: Spendable amount, yeah.

JANUARY 9, 1992

* * * *

[70]

JUDY FRIEGO, DEFENDANT'S WITNESS SWORN

DIRECT EXAMINATION

BY MS. WIENEKE:

Q: Good morning.

A: Good morning.

Q: Can you introduce yourself to the Court please?

A: My name is Judy L. Friego.

Q: What is your present occupation?

A: Assistant deputy warden.

Q: And where do you serve in that capacity?

A: Women's Prison, Florence.

Q: By whom are you employed?

A: Arizona Department of Corrections.

Q: Does the Women's Unit in Florence have a law library?

A: Yes.

THE COURT: Can you pull your chair up please? Thank you.

THE WITNESS: Yes.

BY MS. WIENEKE:

Q: Can you describe that facility for the Court please?

A: It's a room. It's got a full complete library, approximately five or six huge shelving units with law books. It's got five or six desks, typewriters. It's air conditioned, carpeted.

* * * *

[79]

CROSS EXAMINATION

BY MS. AIYETORO:

Q: Good afternoon.

A: Hi.

Q: I don't have to introduce myself to you, because you already know me. I just have a few questions of you. You indicated that you felt Pam McQuillen was able to handle the work that she did as a legal assistant. Do you review the quality of her work?

A: No, not—no, not physically.

Q: Have you ever had Spanish speaking only prisoners on your yard?

A: Yes I have.

Q: Does that happen rather frequently?

A: No.

Q: How frequently does it happen?

A: In three years, I think we've had two or three.

Q: Do you have people who speak some English, but not very good English on your yard?

A: Two or three, those two or three.

THE COURT: Do you have people who are illiterate, who can't read or write?

THE WITNESS: Some, not very many.

* * * *

JANUARY 14, 1992

[92] Q: When did you become administrator for programs?

A: Oh I believe it was in April or May of '88.

Q: At the time you left your position as administrator for programs, how many law clerks did the Gila law library have?

A: I believe they have three.

Q: Are any of them Spanish speaking?

A: Yes.

MR. STRUCK: Your Honor, the reason I'm going into this is because this was not an area that was covered by our stipulated facts. The Mohave law library staffing is in there, but the Gila is not.

BY MR. STRUCK:

Q: I'm sorry, you said you had three law clerks?

A: Yes.

Q: And one of them is Spanish speaking?

A: Yes.

Q: How many legal assistants are at the Gila law library?

A: I believe there are three.

Q: How do inmates at the Papago DWI Unit utilize the law libraries?

A: They make a request to be transported there. I'm not sure whether the request just needs to be verbal or they actually need to make it in writing, but as far as I know there's been no complaints about getting access to the Gila library.

[93] Q: Which law library does the Papago Unit go to?

A: They utilize the Gila library since they're both minimum custody.

Q: About how quickly would an inmate at Papago get to the law library at the Gila Unit after a request is made?

A: Oh it should be the same day unless obviously the request is made after the shuttle has already left and then they'd have to wait until the next day. The same day or within 24 hours.

Q: If an inmate is in lockdown at Douglas how does he get access to the law library?

A: He makes a request in writing for legal materials.

Q: Does that request have to be specific?

A: No it doesn't. Initially I thought it does—we prefer that it's specific because it makes the research and the copying of materials a lot easier, but the inmate can say I would like some materials in a certain area and if he doesn't provide enough information the law librarian—well the law librarian goes to lockdown five days a week, every, I mean she works five days a week so every day she's present there she goes through the lockdown unit and collects these requests. If the requests are too general and they need more information she goes back and asks for more information and the law clerks are very helpful in doing that research and providing the information that the people in lockup are [94] looking for.

Q: How does an inmate request a legal phone call at Douglas?

A: Again, that's usually done by an inmate kite to the counselor. Actually there's a classification parole supervisor now who is responsible for caseload services and lockdown and they make the request in writing and they're probably scheduled as soon as can be arranged. I would say generally within 24 to 48 hours after the request.

Q: Does the inmate have to specify that there's a court deadline in the request to get a legal call?

A: We like to see that, although it's not required. Generally most inmates requests for phone calls are granted unless we feel someone is abusing that and then we will ask them for more specific information.

THE COURT: Do you keep a record of when you receive a pleading from an inmate that he—or paper, legal paper that he says has to meet a court deadline, of when you get it, do you keep a record of that?

THE WITNESS: I don't know if they keep a record of it I think they just ask to see it and then if the coun-

selor, you know, sees that there is a deadline to meet then they say well I understand—

THE COURT: No the reason I brought it up, I've told counsel already, that the Ninth Circuit's been after us and I have cases and the other judges in this courtroom have [95] cases in this courthouse where the Ninth Circuit has told us that we have to grant a rehearing on the issue of when the pleading was filed with the state prison authorities. And we, as far as I know—did you ever find anything out on that? If that's been worked out or not?

MR. STRUCK: No, Your Honor, I don't, I haven't made any attempt as of yet to find out about it.

THE COURT: It seems to me a practical thing to do and I wish somebody would do it one way or the other.

MS. WIENEKE: Your Honor, Mr. Upchurch who, as you may recall, testified and you spoke to him about that, has agreed to look into that matter.

THE COURT: Oh and he will then?

MS. WIENEKE: Yes, Your Honor.

THE COURT: Oh good, thank you.

BY MR. STRUCK:

Q: Where is the legal call made?

A: It's usually made in, let's see, I would imagine it's made in the classification parole supervisor's office. The inmate is escorted there and the phone call is made.

Q: Is there anyone in the office at the time the call is made?

A: I would imagine usually the person arranging for the phone call is there, but if he is asked to leave he will leave.

* * * *

[97] A: I believe there are because I phoned the librarian on Friday just to get some additional information before I came up here. One of the questions I asked the librarian is that, could the inmates make general legal requests and she said yes and then in making her state-

ment she said for example if an inmate has problems with a divorce proceeding or custody proceeding they will ask the inmate that and they will do the research for it. So they obviously have that kind of material available to them in the library.

Q: We've already stipulated that there's a video in the law library from West Publishing Company. Mr. Sloboda are there any other self help videos at the law libraries?

A: Yes there is one from a professor at the University of California, and I believe it's called Legal Research Made Easy. It's not only available in each of the law libraries, meaning the Mohave law library and the Gila law library, with a small television set equipped with a, you know, a video player. It's one of those self contained units. We also show both tapes every month on our closed circuit television system to the total inmate population and it's just shown on a scheduled basis once a month, or both tapes, excuse me, are shown each month around the middle of the month.

Q: Do you recall what the name of the professor is that puts out that video? Does Robert Berry ring a bell?

* * * *

JANUARY 15, 1992

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[94] A: I have a master's degree in library science from the University of Arizona, a bachelor's degree from the University of Florida. I've worked in university libraries. I've worked at the Western Archeological and Conservation Center on a special project as a librarian. I've also been a school librarian.

Q: What year did you get your masters?

A: 1976.

Q: How come you don't have a degree in law library science?

A: There is no such degree, and I attended the American Association of Law Libraries Conference which

the Department sent me to last July. And this was one of the things that was brought up as a problem. There's only one library school that even offers very much in the way of law librarianship, and I believe it's a school in Virginia. This is something that the American Library—American Association of Law Libraries is trying to have happen, more courses in law librarianship.

Q: You mentioned some of your other jobs that you had before you worked with the Department. Could you tell us in a little more detail about the experience you've had working in libraries?

A: At the Western Archeological and Conservation Center, I was hired to do a special project of cataloging, some rather specific cataloging in that field. And so I worked for six [95] months taking care of that on line cataloging with the Library of Congress.

And I was a reference librarian for a semester filling in for somebody who was away at Pima Community College.

All through my own college career, I worked in university libraries. I also worked at the University of Southwestern Louisiana Library, and I guess it was about 1961 and '62.

Q: Do you have any legal law library training at all?

A: Yes. Probably the very best was I spent, oh three or four hours with Ned White, who's a gifted law librarian at the University of Arizona Law School, one on one. He was extremely helpful to me.

Q: What type of things did he help you with?

A: He walked me through the collection at the university law school, and just told me specific things about each one, and the best ways to access the collection, gave me little tips, such as if you don't know what report or something might be in, if you go to the older volumes of the reporters, the regional reporters, it lists the states on the older volumes, little tips like that, whereas the newer volumes do not do that.

I also had some training with Bill Streit who was then the complex librarian at the Tucson complex. He has a

[96] master's degree and quite a lot of experience in law librarianship. And I also attended a workshop at the NAU law library with a very gifted law librarian. In addition to that, the complex at Tucson has a number of videos, some of them from West Publishing, other companies also, and I have watched all of those, probably 30 hours in videos.

Q: When you said that Mr. Streit had a masters, did you mean he had a masters in library science?

A: A masters in library science.

Q: Have you attended any seminars anywhere else in the state?

A: No, just NAU, U of A.

Q: What types of things did the NAU seminar cover?

A: Now when you said had I attended any other seminars, I did go to the American Association of Law Library's convention.

Q: And when was that?

A: And that was in July, and the Department sent me. And there were a number of very good things there, and all of it was law library. I attended a seminar on management. I attended a seminar on copyright. I attended a seminar on library services to prisoners, which was excellent. A panel consisting of a judge, prison librarian, and a university librarian whose field was special services, and consequently she received a lot of the correspondence from prisoners.

[97] Q: When you came back from that conference, did you spread your wealth of knowledge that you gained?

A: Yes, I shared. It had already been set up that I would do this, and I presented a talk on the conference to all of the DOC librarians. We gathered together in Casa Grande.

Q: Why don't you tell me what your duties and responsibilities are as the librarian at the Santa Rita Unit.

THE COURT: Excuse me a minute. Do you know how many there are all together?

THE WITNESS: Librarians?

THE COURT: Yeah, in the prison system.

THE WITNESS: Well when I use the term librarians—

THE COURT: I'm sorry to do that.

THE WITNESS:—not necessarily trained librarians. Some of them I consider acting librarians. Well they are—we call them librarians, but they aren't degreed librarians.

THE COURT: Well whatever their background is.

THE WITNESS: I do not—I cannot tell you exactly how many, no.

THE COURT: How many do you think were there?

THE WITNESS: Oh. I can tell you exactly how many people attended my talk, 21.

THE COURT: Okay. Go ahead.

* * * *

[99] Q: They actually have access to the other libraries at the other units.

A: They have access to the unit libraries of the units where they are housed.

Q: Does every housing unit, besides the complex detention unit have their own law library?

A: Every—well we don't exactly call it a housing unit. We just call it a unit, because there are house—a number of housing units on each unit, but yes, every unit has its own library.

Q: Could you tell us how the law library at the Santa Rita Unit is staffed besides yourself?

A: As far as inmate clerks, I have three clerks. And on my day off, my supervisor covers the library as far as a staff person, not an inmate.

Q: Why don't you tell us what your hours are at that—

A: I work 7:30 to 4:00 Monday through Thursday, and also on Saturdays.

Q: What are the hours of your law library there at Santa Rita?

A: 8:30 to 10:30, and then 12:00 to 3:00, and then two evenings a week from 5:00 to 6:30. Two days a week we are open from 11:00 to 12:00 to have the RV unit in. And I forgot to say that I also provide legal services to the RV unit, Release Violators unit. They are on the Santa Rita [100] yard.

Q: How many people are in that unit?

A: As many as 50. Right now I think there's 36. And we're also open on Saturday afternoons.

Q: Do you have any legal assistants at Santa Rita?

A: Seven.

Q: Are any of the legal assistants Spanish speaking?

A: Right now, no. I did have two. Both have left the yard within the last six months.

Q: Are you attempting to get a Spanish speaking legal assistant?

A: Yes.

Q: Any of your law clerks Spanish speaking?

A: Yes.

Q: How many?

A: One.

Q: Could you tell us what the staffing is at the other law libraries at the Tucson facility?

A: Echo has a full-time librarian who has a master's degree. Rincon has a full-time librarian who has a master's degree. The complex librarian is full-time, and has a master's degree. Right now the Cimmaron position is vacant, and it's staffed by an officer, and also by teachers in the admin—or the supervisor in the education department at Santa Rita.

Q: When you say—when you said that those other three [101] librarians had master's degree, you mean they have a master's degree in library science?

A: Yes.

Q: If the individual at the Cimmaron law library needed assistance, could he call on somebody else?

A: The complex librarian, yes.

Q: How many law clerks are at the other units?

A: Cimmaron has two law clerks, Echo has one, and Rincon has five.

Q: And how many legal assistants?

A: Cimmaron has 13, Echo has one, and Rincon has five.

Q: Do you know what the hours of operation are for the other units law libraries?

A: I can't give you the specific hours, and I think that would be confusing—a confusing way to manage it anyway, but I can give you the total number of hours per week.

Q: Okay.

A: Cimmaron is open 61 hours per week, Echo 76 hours per week, and Rincon 80 hours per week.

Q: Do you have any—are you responsible then for hiring the law clerks?

A: Yes.

Q: When you hire a law clerk, is there any exam that you give them?

A: I do two things. I have an application form which I [102] designed which asks for background, asks questions about their skills, typing, computer skills, et cetera. In addition to that, I have them take the GED exam unless it's clear to me on my—what I call my application/interview, if they haven't completed high school, then I make sure they take the GED or the Tabe test which tests ability levels, and places them in the proper GED class. In addition to this I have a law exam. If the applicant is somebody who's been on the yard a long time, and I pretty well know what he can do, then it's much easier. If not, I really need to depend on that—my law test.

Q: So if there's an inmate that you're familiar with on the yard, and you believe that they have acceptable skills, then you don't necessarily give them the test.

A: That's right.

Q: Could you describe for us what this test entails that you give the other law clerks that you're not so familiar with?

A: Yes. It asks general questions like what's a digest, what's a horn book. It asks some specific questions about books that anybody who would want to do legal research would know. It asks what shepardizing is. And then there's a matching—one question that's a matching where you just draw lines to what definition applies to what word. There's a question about rules of evidence. It's a pretty extensive test.

[103] Q: When you say pretty extensive, about how long would it take to complete?

A: It takes a couple hours.

Q: Do the legal assistants take this test as well?

A: Again I kind of judge how capable they are. In the event—in the case of legal assistants, I usually don't give that test, because I'm not the one who makes the final decision on legal assistants. That's up to the warden.

Q: But you have given a legal assistant that test in the past?

A: I have and then I base a recommendation on that.

THE COURT: Isn't the final appointment of a legal assistant up to the warden—

THE WITNESS: Yes.

THE COURT: Well now wait a second. Because of security reasons rather than whether he would make a good—he or she would make a good librarian?

THE WITNESS: That I don't know.

THE COURT: I expect so.

THE WITNESS: It sound logical.

BY MR. STRUCK:

Q: Could you tell us what the duties of a law clerk at the Santa Rita Unit are?

A: Generally assist patrons, help them find books, teach them how law libraries work, anything from shepardizing to [104] how am I going to find a case about

this, or what does this abbreviation mean, what does this F.2d mean.

Q: How do inmates on the Santa Rita yard get access to the law library?

A: Walk in. Walk in and sign the log book, no passes, no extra paperwork is required. It's an open yard.

Q: Do you know what the capacity is at the law library, at the Santa Rita law library?

A: You don't have to have a pass.

Q: No. Do you know what the capacity is at the law library?

A: Oh, what the capacity is. Well that's very interesting, because I try to think of the library as one library, and I allow people from the law library to—if it's—if they're—it's rarely really full. I've never turned anybody away. But if it does get somewhat crowded, they can come over into the general library, and it's really just all one. And I even have a typewriter for law people set up on the general side.

Q: How many typewriters do you have at Santa Rita that inmates can use?

A: Nine.

Q: Are they electric?

A: Six are.

Q: Would you tell us what the duties of a legal assistant at Santa Rita are?

[105] A: Legal assistants can actually draft pleadings, and do just about any kind of legal work for an inmate.

Q: Are you responsible for setting up the legal assistants' schedule for—strike that. How does an inmate who is at CDU get access to the law library?

A: He fills out a request form. I designed a request form, and he fills that out, gives it to the officer sometime during the day or evening. It's in my box the next morning, the following morning when I get to work.

Q: How does the inmate—so they would request—strike that. How do the inmates at CDU know who to request for a law assistant, legal assistant?

A: There's a posted notice at CDU saying just exactly who the inmate legal assistants are, and what evenings they come to CDU.

Q: Are there any restrictions on the number of requests that an inmate could make?

A: No.

Q: An inmate in CDU?

A: No.

Q: Are there any restrictions on the number of times that a legal assistant could go to CDU?

A: Well there's the constraint—I mean he can't just go to the gate, and say I want to go to CDU. He has to be allowed; he has to be approved. But other than that, no there are [106] none.

Q: On the number of times he can go.

A: No.

Q: If a legal assistant wanted to see one of their clients in CDU, can he just make that request?

A: Provided he's approved to travel to CDU.

Q: So an inmate that's in CDU doesn't necessarily have to request to see a legal assistant.

A: It can—correct. If the inmate legal assistant has some reason to see somebody at CDU, he lets me know, and I simply put that on the list for that evening.

Q: Do inmates at CDU have to make specific requests—if an inmate didn't want a legal assistant, if he just wanted some materials from the law library, how is that done?

A: If he knows the specific citing, that's fine, and he lists that. We have a place to list that. If he only has a general topic, if he wants policies covering whatever, he can tell us that. We will also shepherdize for inmates. So if he can give us a general idea of what he wants, we will try to help him. Another thing we do which I was very worried about when I attended the copyright seminar at the American Association of Law Libraries, we copy indexes of books in order to help them determine what they need.

Q: What happens if you get a request from an inmate at CDU for materials, and you—it doesn't make any sense to you, [107] you don't know what they want?

A: I—sometimes I will call the officer at CDU, and ask him to get on the intercom, and find out, ask the inmate some questions. More frequently I wrote a note saying be more specific, or I ask a couple of questions that help define the problem in what he needs.

Q: So you'll actually make an attempt—

A: Yes.

Q: —to figure out what it is.

A: Yes.

Q: Would you ever just send back the request, and say be more specific, I can't help you?

A: Well I don't think that we would say can't help you. We have sent back requests asking them to be more specific. And if we have an idea of what it is, we frequently say be more specific, and send them the index of something that we think is where they're headed.

Q: But you don't require them to give you a specific citation, do you?

A: No. Many of them do give us many specific citations.

Q: What is the turnaround time from the time an inmate makes a request at CDU for legal materials till the time they actually get it?

A: Well a little bit depends on the time, the day of the week that he puts it in. For instance, we go—we send [108] inmate legal assistants Monday, Wednesday and Friday nights. So if he puts it in after the inmate legal assistants leave on Friday, I will get it on Saturday, but he won't get it back till Monday night. Whereas if he puts it in on Tuesday night, it'll be in my box on Wednesday morning. He'll get it back Wednesday evening.

Q: How is the copying done at the Santa Rita law library?

A: We have a law clerk who operates the copy machine. We have an excellent copy machine, and he does the copying.

Q: About how long does it take for say if someone comes in with some copies, how long would it take for them to get their copies generally?

A: Many times five minutes. If we have a backlog, or in the very middle of some copying for CDU, usually we'll interrupt the CDU copying. But I would say at the most 15 minutes, and he can just stand there and wait for it.

Q: As he's standing there, can he actually watch the copies—

A: Yes.

Q: —being made?

A: Yes.

Q: Do you have any policies regarding the copying of the Arizona Department of Corrections' policies and procedures for inmates?

A: Yes. I copy them free, whether it be for inmates at CDU, [109] the RV Unit, anybody, I will copy policies for free.

Q: Even if they're not indigent?

A: Yes.

Q: Have you ever had any illiterate inmates request legal services or legal help?

A: Yes, and I have two things that I do. I put him with whoever I think is most appropriate to help him. For instance, if it's a Spanish speaking with the—I put him with our Spanish speaking law clerk, and they do help him. But I also do everything in my power to get him to the literacy classes. Right now I don't know of any literate (sic) people who are asking for help on the Santa Rita yard.

Q: Any illiterate people?

A: Yeah, illiterate people. I do remember one that was illiterate, that I did just exactly what I said. And he did go to the literacy classes, and he learned to read.

Q: When you're providing materials to the inmates at CDU, do you ever actually bring them the book?

A: Yes.

Q: How long can they keep the books?

A: Overnight or sometimes even for two nights. Usually just over night, because I don't like to see the Santa Rita collection not have a full collection. So if we've taken a book over, I generally will stop on my way in in the morning and get that book.

[110] Q: If there was something in that book that they wanted copied, would you do that?

A: Yes. We do extensive copying, 100 pages sometimes.

Q: Is there any restriction on the number of books that you'll bring an inmate at CDU?

A: No.

THE COURT: He means at one time. You understood that?

THE WITNESS: Well it really hasn't happened too frequently, because they can't keep them a long time. So they only ask for one or two. I've never had anybody ask for more than two at a time.

THE COURT: How long can they keep them?

THE WITNESS: Well as I said, I don't like the Santa Rita collection to be without the books. So I usually pick them up the next morning. Some things I have two copies of. Prisoner Self Help I have two copies of. I let that go out for a week.

BY MR. STRUCK:

Q: But as you said, if you want to make—if they wanted a copy of something, you'd make a copy for them.

A: Yes.

Q: How do inmates at the Santa Rita yard know who the legal assistants are?

A: The list is posted in many places, all the counselors' [111] offices, all the housing units, at the library. The list is all over the place.

Q: Inmates are allowed to roam the stacks at Santa Rita?

A: Yes.

Q: Are they allowed to roam the stacks at all the other law libraries at Tucson?

A: Yes.

Q: I have no more questions.

MR. ADAMS: One moment, Your Honor.

CROSS EXAMINATION

BY MR. ADAMS:

Q: Good afternoon, Ms. Joyner.

A: Hello.

Q: I noticed you were looking at notes. May I see a copy of those notes?

MR. STRUCK: I have no objection, Your Honor.

MR. ADAMS: May I approach the witness, Your Honor?

THE COURT: Sure. They even get them from FBI men. So you're in good company.

THE WITNESS: I won't take it personally.

BY MR. ADAMS:

Q: Ms. Joyner, you indicated that you attended a seminar, and that you gave a talk to the persons who staff law libraries in the Arizona Department of Corrections. I believe the number was 21.

[112] A: No. They were 21 people in the group. Some were there, the supervisors of librarians. I don't know exactly what everybody did, but I believe all the DOC librarians were there.

Q: Isn't it correct that it is not your responsibility to train persons who staff the law libraries in the libraries throughout the system?

A: That's correct.

Q: You indicated that you provide law clerks with an examination.

A: Sometimes.

Q: Sometimes. You hardly ever provide legal assistants with an examination. Isn't that correct?

A: I wouldn't say hardly ever. Probably about the same frequency or ratio that I do the law clerks.

Q: Do you remember having your deposition taken?

A: Yes.

Q: It is your testimony that you provide law clerks and legal assistants examinations at approximately the same rate of time?

A: No. It's—this is a hard generalization for me to make, because I am inconsistent.

Q: It is your practice, as I understand your testimony, to provide law clerks examinations when you deem it necessary. Is that correct?

[113] A: Correct.

Q: And there is no policy that you're operating out of that's developed by the Department of Corrections that law clerks be tested. Isn't that correct?

A: That is correct.

Q: And there is no policy promulgated by the Department of Corrections that legal assistants be tested. Isn't that correct?

A: That's correct.

Q: The examination that you give law clerks, what does that exam entail?

A: As I explained when I was asked this question previously, it's a general exam. I believe that both of you all have copies of it. You were given copies of it. And it has questions about digest, questions what is a horn, just some very basic questions, and it has some more specific questions. It also has a matching question where they match explanations or definitions with titles of books.

Q: And isn't it correct that you do not have a set grade or passing score that each law clerk must take—must reach?

A: That's correct. I use that exam to give myself a sense of does he understand this, or does he not understand this. And very frequently what will happen is a person will come in, and they'll sit down, and they'll spend a couple hours. They'll do the exam. They'll do

very well. And then I've [114] had it happen more than once that a person sees the exam, and immediately decides he doesn't even want to be a law clerk. Or sits down with the exam, and in half an hour comes to me and says I can see this is not what I need to do, what I'm capable of doing, or that I don't understand this enough.

Q: And isn't it correct that the primary responsibility of the law clerk is to show the prisoner where to find a law book, to get law material for that particular prisoner?

A: That's one of the primary responsibilities.

Q: And what is another responsibility? What is another primary responsibility?

A: Well I believe that law clerks should have a little bit of understanding of what they're doing, know how to shepardize, and I mean you can't just—it sounds to simple to say where the books are. A little bit of a sense of when it's appropriate to look for which books.

Q: Isn't it correct that the law clerk is not required to—in fact is prohibited from doing legal research and drafting pleadings for prisoners?

A: That's correct.

Q: You indicated that the law library hours are I believe from 8:30 to 10:00?

A: 30.

Q: That's 10:30 a.m. or p.m.?

A: A.m.

* * * *

[116] A: * * * When you're an open yard, nobody needs any passes. I've never turned anybody away from the law library. There isn't anybody that I know of who has ever said that they didn't have enough time in the Santa Rita law library. These inmates walk out of the door at I believe 6:30 a.m., and they can go any place they want to all day. A lot of them come to the library.

Q: Ms. Joyner, you indicated that on Mondays, Wednesdays and Fridays I believe law clerks go to CDU?

A: Yes, in the evening.

Q: In the evening.

A: Yes.

Q: And they don't go on Saturdays and Sundays. Isn't that correct?

A: Correct.

Q: And you also indicated in your direct testimony that once a prisoner requests—who's in CDU requests legal materials, that gets to you the next day, and then the materials are sent the following day, except in the case of a weekend. So if things go smoothly, if a prisoner makes a request on a Thursday, he does not receive the materials until Monday.

A: No. If he makes it on Thursday, Friday morning the person who covers for me, my supervisor, picks the request up out of my box. They're processed, and go back Friday night.

Q: Are there instances—are there not instances where [117] prisoners do not receive their legal materials the next day?

A: Well yes. If the request was done on a Monday, I get it on a Tuesday. He's not going to get it back still till Wednesday night.

Q: How is it determined which of your law clerks go to CDU?

A: Actually right now it's inmate legal assistants who are going, and they have to have approval to travel. If you're an inmate legal assistant, and I have seven, you're eligible to go to CDU provided you have approval to travel.

Q: Isn't that correct that not all of your legal assistants have that approval to travel?

A: Correct.

Q: And therefore the decision whether or not they go to CDU is not determined by their skill level, but by security consideration?

A: Well one assumes that they have a certain amount—a certain skill level to even be an inmate legal assistant.

Q: But that was not my question. Once they are all legal assistants, the decision that they are selected to go to CDU is not determined by their skill. It's determined by their security consideration. Isn't that correct?

A: It's not that simple. If I had somebody who for some reason I didn't feel should or could go to CDU, I would have the—I wouldn't have to send him. As it happens, any of the seven that I have right now I feel would be very capable, and

* * * *

[119] MR. STRUCK: Could counsel continue reading through line 24 please?

MR. ADAMS: Certainly.

"Q: When you say give a good lead, what do you mean?"

"A: This area I think it may be in there, in there, things pertaining to whatever."

Anymore?

MR. STRUCK: No, Your Honor.

BY MR. ADAMS:

Q: You've never gone to a convention before 1991, have you?

A: No.

Q: You indicated that you were aware that there are illiterate prisoners on the Santa Rita yard. Isn't that correct?

A: I don't know of any right now.

Q: But you are aware that there have been?

A: Yes, very few.

Q: How do you know that there are very few?

A: I work in the library. Well now I shouldn't say that, because the ones who are illiterate probably wouldn't come in the library. But any that we have, we have an excellent program, literacy program, and they hear about it, and people want to learn to read.

Q: Are these literacy classes in Spanish?

[120] A: Now that I don't know if they're offered in Spanish and English. I just don't know.

Q: Ms. Joyner, you indicated that there are legal assistants who work out of the library at Santa Rita. Do you evaluate the quality of their work product?

A: No. I don't look at any of the inmates' personal materials or lawsuits, not even the copying stuff, or in the process of copying.

Q: There's no requirement, is there, that legal assistants or law clerks must be bilingual, or that you must have a particular percentage of them who are bilingual by policy?

A: No, no.

Q: No further questions.

REDIRECT EXAMINATION

BY MR. STRUCK:

Q: Just a couple questions. At the beginning of cross examination you said you were inconsistent about giving the exam to the law clerks or the legal assistants. Could you explain maybe one more time why you're inconsistent with that?

A: A lot of times I really know what somebody can do. I've been maybe watching them for two years. At other times it'll be somebody who's brand new on the yard, and I have no indication of what they can do.

* * * *

[122] BY MR. STRUCK:

Q: On cross examination plaintiff's counsel went through some deposition testimony in which you stated that in the deposition you need a very good lead or a good lead. Could you explain what you mean by a good lead when—let me—

A: A subject. What's your issue.

Q: So all someone would have to do is just give you the subject of what they wanted?

A: Yes. And I have to say we've gotten a lot better at that, as we are more experienced, just like anybody does in anything that you do a lot of.

Q: So if someone just said I want some information on a 1983 action, is that a—do you consider that a good lead to get material for them, civil rights?

A: Yeah. I would investigate it a little bit, and say now let's see, 1983. Now what does that have to do with? And if I knew, then—or if the law clerks—that's another thing. The law clerks or the inmate legal assistants. I meet every single week with all the clerks who work in the library. In addition I meet every single week with all the inmate legal assistants. And if there are things that come up, I make notes all through the week. Does anybody know what does this mean? Who, what might he want? And then I would—if I didn't have an idea of some things to send over, I would ask * * *

* * * *

[133] THE WITNESS: Yes sir. Unless we go to refresher training, and then maybe some of them are there, yes.

THE COURT: And when you have meetings within the unit, like within your unit, how often do you meet with your fellow counselors?

THE WITNESS: Usually once a week.

THE COURT: And you go over problems and—

THE WITNESS: Yes.

THE COURT: —what's going on and all that.

THE WITNESS: Our supervisor brings up any issues he has, and then he allows us to bring up any issues we have.

THE COURT: By the way, I'm not trying to suggest that all the problems are with the administration. I realize you have problems with prisoners too. Some people, like anywhere else, you can't satisfy them—

THE WITNESS: Yeah.

THE COURT: —or they have problems of their own. But even there sometimes I assume you try to steer them, or get somebody to look—can you get a hold say of a psychiatrist or psychologist—

THE WITNESS: Yes sir.

THE COURT: —and tell them you think there's potential problems?

THE WITNESS: I usually refer them to the [134] psychologist. We have a psychologist on the yard, yes. I will refer them to that psychologist, and then it goes from there.

THE COURT: And you feel that you are free to do your job then, huh?

THE WITNESS: Yes sir.

THE COURT: Okay.

BY MR. STRUCK:

Q: You said when you come in in the morning you call the pod officer.

A: Uh huh.

Q: Is this something you do every morning when you come to work?

A: Yes sir.

Q: And how many days a week do you work?

A: Five.

Q: And you ask the pod officer if he has anyone for you?

A: I just tell him if he has anyone to send them up. Sometimes he does, sometimes he doesn't. If he doesn't, then I usually get up and walk down in the pod, and try to walk around both A and B pod, which are mine, and talk to the people that are there.

Q: And when you say that, you mean send them up for any reason, or—

A: Yes.

* * * *

[136] Q: When an inmate comes up to make a legal call, how do you verify that it's actually a legal call?

A: I ask them for the number and the name of the attorney, and then we go, depending on where it is, if it's in Tucson it's a 9 line, or if it's out of Tucson it's an 8 line. And then I will dial the number, and listen for the person to answer the phone. They usually answer it, Law Offices of so and so or whatever. And then I just tell them just a moment, and hand the phone to the inmate.

Q: Once you—well do you require that an inmate who's requesting a legal call give you—show you some kind of court deadline?

A: I don't, no.

Q: So any of your inmates can make a legal call regardless of the situation.

A: Yes sir.

Q: They don't have to tell you what the nature of the call is.

A: No sir.

Q: Once the inmate gets on the phone, what do you do?

A: If I have paperwork I work on it. I may have another inmate waiting outside the office. I'll walk out, talk to them to see what we need to—what I need to do next so I can [137] try to be one step ahead.

Q: So there are occasions when you'll stay in the room when they're making the call?

A: I may, yes, if I have paperwork to do.

Q: When you're in the room and they're making a call, do you listen to what's being said?

A: No I couldn't. I'm not speaking for everyone, just for me. But it's hard for me to tell on half a conversation what's going on anyway.

Q: Do you have to stay in the room?

A: No.

Q: If an inmate requested that you leave the room, would you?

A: Yes.

Q: If the inmate's attorney asked you to leave, would you?

A: Yes. Usually I don't talk to the attorney, but I would, yes.

Q: Do the other counselors that you work with have the same practice?

A: Yes.

THE COURT: Do you know if that's a written policy, what you just described?

THE WITNESS: We had one that was that way, and then we were told it was rescinded. I've never seen the rescinded policy, but it was rescinded. I know it was

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[139] Q: Have you ever walked out of your counselor's room when Melvin Coley was making a phone call?

A: Oh yes.

Q: Has there ever been an occasion where it took eight days between the time an inmate requested to make a phone call, and the time that he actually got the call?

A: No sir.

Q: What's the usual turnaround time on that?

A: Like I said, usually when they come up, if an inmate says I need to make a phone call, we do it right then. Because I never know what's going to happen the next day. So if I'll say well we'll make it tomorrow, and then I come in and something happens where I'm not down there, then you know, we can't do it. What I usually do is make it right then.

I have had guys when I was going out to go home say hey I need to make a call. I say okay, put your name on the list. We'll get you up there in the morning or as soon as possible, and we'll do it. * * *

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[142] DIRECT EXAMINATION

BY MR. STRUCK:

Q: Would you state your name please?

A: Sue O—

THE COURT: Life has so many facets. Go on.

BY MR. STRUCK:

Q: And what is your occupation?

A: I'm a librarian I at ASPC Winslow.

Q: Are you stationed in any particular library at Winslow?

A: I'm in the Kaibab complex library.

Q: Could you tell us what your educational background is please?

A: I have a master's degree in secondary ed., business ed. I have a bachelor's degree in secondary education, business education with a minor in library science.

Q: What are your responsibilities as the librarian at the Kaibab Unit in Winslow?

A: I have to arrange the turnout, the daily turnouts. We have four turnouts a day. I have to schedule legal assistant meetings with lockdown inmates. I have to supervise the general library. I have to supervise the law clerks. I have to hand out indigent legal supplies. And there are other things that go along with that.

* * * *

[144] THE COURT: Well how do you know they wouldn't stipulate to that, what you're going to ask?

MR. STRUCK: They may stipulate to that, but it was only going to take a couple of questions.

THE COURT: Oh, okay, all right. Go ahead. It's only going to take a couple—

MR. STRUCK: Well I'm not going to spend—

THE COURT: We're going to talk about it longer than your questions. So go ahead.

BY MR. STRUCK:

Q: How does an inmate at the Kaibab law library get legal materials then?

A: He goes to the law counter, and asks one of my law clerks, and they'll get the materials for him.

Q: Do they have to make—give an exact citation to get that material?

A: Not necessarily. Some of them know, some don't.

Q: If they—they can make just a general request then to get materials?

A: Yes.

Q: Do you have any typewriters there at the Kaibab law library?

A: I think we have eight now.

Q: Electric typewriters?

* * * *

[148] THE COURT: Well I understand that. That's why I said if there's a prejudice about it. Well the problem is I've let you all do some of that too, and I don't want to get too hard nosed about it, because I think it's really probably a bigger storm than we need have. Why don't we just let it in, and subject to a motion to strike, and you can tell me when he's all through whether it's a big problem from you, and why it's a big problem, why you can't possibly meet it. Okay?

MR. FATHI: Thank you, Your Honor.

THE COURT: It may be less than you think it is. Go ahead.

BY MR. STRUCK:

Q: Ms. Ori, how does an inmate at the complex Detention Unit get access to the law library?

A: They send a kite or they send a request for legal assistance.

Q: And who gets that request?

A: I usually get the request.

Q: And what do you do with the request?

A: I read it, find out what they want. If it's—if they have a legal cite, and they just want copies made, I give it to one of my clerks to pull the documents and copy them, and [149] then we deliver them. If it's a request for

legal assistance, then I make arrangements with the lock-down unit as soon as I can to get them down there.

Q: About how long does it take after you get the request for you to fill it?

A: For copies?

Q: Yes.

A: Generally 24 hours.

Q: If it's a—if it's not a specific request, a general request, about how long does it take to fill that request?

A: If it isn't anything involved, the same amount of time.

Q: About how many inmates are on the Kaibab yard?

A: Both north and south yards there are about 800.

Q: And that law library serves both north and south yards?

A: Yes.

Q: What percentage of those inmates use the law libraries on a given month on the average?

A: Those that actually access it, for the month of December which was probably a typical month, they were about five percent.

Q: That's December of 1991?

A: 1991.

Q: About what percentage of the inmates at the Coronado yard utilize that law library?

A: It's much lower. It's only about two or three percent.

* * * *

JANUARY 16, 1992

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[13] THE COURT: Do you—then if I understand it, is your—the work you do limited—it isn't just limited to health matters is it?

THE WITNESS: Your Honor, no it's not. It's limited—I mean it involves planning, training. It involves the areas not only within human resources, but now in a number of other areas as executive assistant director.

THE COURT: What do you do if you can get a court decree such as the Gluth case, which is presumably is settled law at the moment. I don't know if it got an appeal going through the Supreme Court or not. I haven't checked it out or been interested in it one way or the other. But at least it's in effect now. Is that translated into a regulation that the Department enacts?

THE WITNESS: Your Honor, yes sir, it is. In fact that is a continuing process, as you're aware. Depending on how the case law changes, we have to look at what our policies are and then translate them into a policy for the department.

* * * *

[94] Q: Do you receive any reports regarding the average usage of the law libraries at ASPC Perryville?

A: Yes, I receive a report on a monthly basis from each unit.

Q: Do you—could you tell us what the average usage of the law libraries at Perryville are?

A: Okay. You want to do it by unit?

Q: Why don't we do it by unit.

A: Okay. Santa Maria unit, they're averaging ten over the last quarter.

Q: Ten per month?

A: Ten per day.

Q: Ten per day.

A: Right. I'm sorry.

Q: And the last quarter is from when to when?

A: That was looking at October through December.

Q: Okay. How about Santa Cruz?

A: Santa Cruz was 28 I believe.

Q: San Pedro?

A: San Pedro was running 21 I believe.

Q: And San Juan.

A: San Juan was higher. It was running 31 I believe it was on an average.

* * * *

JANUARY 27, 1992

* * * *

[33] THE WITNESS: No sir. This policy has, Gluth has not. All the provisions of Gluth have not been implemented.

THE COURT: Just for the areas covered by the injunction you mean?

THE WITNESS: Yes.

THE COURT: Is where they've been implemented?

THE WITNESS: Yes. See Gluth only had to do with the Central Unit in Florence.

THE COURT: No, but you were just describing that you wanted everything to be the same.

THE WITNESS: And that's why we developed this policy, Your Honor, so that each prison at least followed this policy.

THE COURT: Oh.

BY MR. STRUCK:

Q: 30211 doesn't have anything to do with training of inmate legal assistants does it?

A: No.

Q: 30211 identifies various standard law library hours that each law library should be open. Are you aware of that?

A: Yes.

Q: Do all the law libraries throughout the system follow the timeframe, I believe it's 7:00 a.m. to 10:00 p.m.?

A: No, they do not.

[34] Q: Why is that?

A: They have to, if they want an exception they have to have a written exception either by myself or Director Lewis. We have law libraries, the most classic is Yuma, they kept a record of their attendance. They were getting an average of three inmates a week requesting to go to the library and we thought it was a waste of staff time to have the library open from 7:00 in the

morning to 9:00 at night seven days a week when nobody was there. And we could accommodate the hours that inmates were required to use the library without having the library opened that number of hours. And we have some other institutions who have done the same thing. That the use did not justify keeping it open seven days a week, those hours.

Q: What type of documentation do you require before agreeing to not follow that particular policy?

A: We would require the attendance over a period of probably 60 days, a daily attendance, how many inmates requested, how many were scheduled in and some of those would have Saturday or Sunday where nobody would go to the legal library or request to go. So we did not require them to keep it open, but we made them keep accurate records and write us a justification why we should modify their hours or give them an exception.

* * * *

[39] BY MR. STRUCK:

Q: How are lockdown inmates afforded access to law library materials throughout the Arizona Department of Corrections?

A: In what prison jargon they use a kite system. They send in an inmate interview request to the legal library saying I want these types of materials or this, copy of this, whatever they want, and they do not have access to the legal library. It's through correspondence and then that material is sent back to their lockdown status from the legal library.

Q: Why are not lockdown inmates afforded actual physical access to the law libraries?

A: It just becomes a logistical nightmare to escort those people who, for whatever reason, have been placed in lockdown status either as a result of discipline, investigation or something and a judgment was made by somebody they needed to be locked away from the general population.

To move those people normally legal libraries are somewhere in the center of your prison, to move those people we have a policy that lockdown inmates normally are moved in restraints with two escorts. It becomes very staff intensive, disruptive to the institution to move those people across a yard when the inmates are out, whatever they're doing out, and with those time frames that are set in most prisons now, from 7:00 to 9:00, for libraries to be open for general population, we do not want to mix lockdown inmates [40] with general population inmates. And that's the basic reasons, the manpower, logistics and mixing those lockdown with general population inmates.

Q: And could you tell us what the reasons why you don't want to mix the lockdown inmates with the general population inmates?

A: Well people are in lockdown status for a variety of reasons. They are either discipline problem, maybe there because they've asked for protective custody and were waiting for a hearing or doing investigation, they may be in some danger in that yard. There's always the danger of contraband being passed and sent back into those lockdown facilities which are high security facilities. So there are a multitude of security reasons for not mixing general population and lockdown inmates. If you didn't want them isolated why would you lock them down, if you wanted them to have contact with general population inmates?

Q: What is the legal phone call policy within the Arizona Department of Corrections?

A: Well our official policy is that the primary means of communication between an inmate and his attorney should be by written communication. But we realize that inmates have deadlines or have issues that come up that they need to talk to their attorney. Our inmate phones are all recorded and monitored and posted that if they use those phones that phone [41] is going to be listened to and tape recorded. So if inmates want a legal phone call they have to go to their program officer and make arrangements over a state phone to call the attorney so

that it is not a recorded or monitored phone. We like the inmate to give some justification why he needs a phone call and cannot handle that business through the mail, simply because we're taking some staff time, a state phone line and those area the primary reasons for that.

Q: There's been some testimony that these phone calls take place in the CPO's office, offices, generally, is that correct?

A: Correctional Program Officer, yes that's the primary person responsible for setting up those legal phone calls.

Q: Is there any requirement that the CPO be in the room with the inmate when he makes the phone call?

A: Normally the requirement is that the CPO make the call, do the dialing and make sure the attorney's there and it is an attorney's office and then gives the phone to an inmate. There is no policy they should be in. We say they should not listen. Normally the problem is those are, those phone calls are placed in the program officer's office, who has a caseload of 70 or 80 inmates, probably has files and a lot of material in there on the desk, in and around that area, that he should not give another inmate access to. It's rather inconvenient to clear the desk and lock everything up for [42] somebody to have a 15 minute phone call. And I'm not so naive that I know that CPOs normally are not handing the phone to the inmate and they're sitting in there doing some work while this phone conversation goes on. They are told, you know, legal calls are none of your business, don't listen. I don't think they sit there to listen, but it happens.

Q: But again, there's no requirement? If a CPO wanted to get up and leave the room or was asked to leave the room by the inmate for confidentiality reasons he would do so?

A: I think in every case they probably would and look in through the window or something.

Q: What is the Department's indigency policy as far as obtaining legal materials?

A: Currently under this policy 30211 for all facilities except the Central Unit in Florence, it's set at \$22.00. And if for 30 day period of time they have not had \$22.00 on their books they qualify to get legal supplies at the state expense. If they've had over \$22.00 they're required to buy their own.

Q: How did the—where did the \$22.00 figure come from? How was that arrived at?

A: Doing some research, in about 1978 we had some business people do a survey of what they thought the necessities for an inmate were in the area of toilet articles and things and [43] what the prices were in the store and they arrived at a figure of \$12.00. That \$12.00 was in effect until this policy came out last year. At that point, this was being challenged as too low. We took the \$12.00 figure and had a budget analyst at the Joint Legislative Budget office run the inflation factor in the state of Arizona since 1978 and he arrived at the figure of \$22.00, I think and forty some cents. So that's how we arrived at \$22.00.

Q: Do you have any knowledge as far as what other states have as far as a dollar amount for an indigency obtaining legal supplies based on being an indigent?

A: We did last year a survey of some other states. Found that California is zero, if you have no funds on your books the state will furnish your legal supplies. Colorado is \$5.00 for a 30 day period. Nebraska is \$10.00 for a 30 day period. Nevada is \$10.00 for a 30 day period and Texas is \$5.00 for a 60 day period.

Q: In your position as the assistant director of adult institutions are you overall in charge of the disciplinary process and the classification process?

A: Yes I am.

* * * *

[50] Q: Going back to the indigency policy that we discussed before, do you have an opinion as to whether

\$22.00 is an appropriate level for an inmate to receive legal supplies as an indigent?

A: Yes I believe it's adequate. Whatever you set it there's a lot of manipulation of that process.

Q: What do you mean by that?

A: People receive funds from a variety of ways. In fact I'm in a long grievance of one now on death row who his is over only postage. He makes absolutely sure that he stays one dollar under that limit so the state pays his postage each week. But he gets money monthly, but he makes absolutely sure that it's one dollar under the standard. And people are going to do that. Whatever system you put in people are going to figure out the system and work it to their benefit and that's human nature. But it gets manipulated. In my professional judgment \$22.00 is an adequate standard.

THE COURT: I didn't quite follow the business of you get money in different ways. Isn't all money that's received, unless it's illicit or illegal, required to be deposited by the prisoner—

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(Title Omitted in Printing)

**DEFENDANTS' OBJECTIONS TO IMPLEMENTATION
OF THE GLUTH INJUNCTION
IN PARTICULAR FACILITIES**

Defendants, pursuant to § 2(b) of the Court's November 25, 1992 Order, set forth the following specific objections to implementation of the injunction ordered in *Gluth v. Kansas* in particular facilities within the Arizona Department of Corrections.

A. *The Law Library.*

Although the Court's Order in *Casey* refers to appointing a Special Master to implement injunctive relief set forth in *Gluth* for each facility within the Arizona Department of Corrections, Defendants are concerned that the Court may have intended to apply the specifics of the *Gluth* Order to each unit within each facility. In other words, Defendants are concerned the Court and/or the Special Master may require that Defendants provide a separate law library at each unit at each facility within the Arizona Department of Corrections. At the present time, there is no law library at the Aspen DWI and Flamenco Units at ASPC-Phoenix, at the Papago DWI and Maricopa Units at ASPC-Douglas, and the Picacho Unit at ASPC-Florence.

Defendants presented evidence at trial that despite the fact there are no law libraries at these units, all inmates at these units are afforded sufficient access to law libraries at other units within the facility. If necessary, Defendants are prepared to present additional evidence supporting

the fact that a law library is not required at each particular unit. Finally, Defendants point out that there was no evidence presented by the Plaintiffs at trial that inmates at the units without a law library were not afforded sufficient access to a law library at another unit within the same facility.

B. *Schedule*

The *Gluth* Order requires that the law library shall be open for prisoner use at least twelve hours each day between the hours of 7:00 a.m. and 10:00 p.m. It also requires at minimum of four turn-outs to be scheduled each day providing prisoners a minimum of two hours of actual library use. Defendants submit that these requirements were put in place in the *Gluth* case because of the security level of the Central Unit at Florence. Defendants submit that at unit's housing Level 3 and lower custody inmates where the yards are "open" and inmates have access to the law library without submitting a request, it is not necessary for the law libraries to be open for as many hours as required in *Gluth*. These units include the Gila and Mohave Units at ASPC-Douglas; Cook, Rynning and East Units at ASPC-Eyman; South, North, and the Women's Division Units at ASPC-Florence; San Juan, Santa Cruz, and San Pedro Units at ASPC-Perryville; Rincon, Santa Rita, and Echo Units at ASPC-Tucson; ASP-Ft. Grant; Tonto and Graham Units at ASPC-Safford; ACW and Globe Units at ASPC-Phoenix; ASP-Yuma; and the Coronado and Apache Units at ASPC-Winslow.

Defendants submit that at these open yards, inmates have unrestricted access to the law libraries and are allowed well over ten hours a week of actual law library use. If Defendants are required to keep law libraries open at least twelve hours each day, as required by *Gluth*, additional unnecessary expenditure would be required for staffing. Defendants recommend that the requirements under § 1(b) of the *Gluth* Order be waived

for units with open yards. Defendants are prepared to present additional evidence if necessary to show that these inmates have sufficient access to a law library. Finally, Plaintiffs failed to present any evidence at trial that inmates at open yards were provided less than ten hours of law library use per week.

C. Request Procedure.

1. Open yard facilities.

At the open yard units previously listed, inmates are not required to request turn-outs. A requirement that units with open yards comply strictly to the schedule and request procedure requirements set forth in the *Gluth* Order would actually result in less library time for inmates at these facilities.

2. SMU.

At the Special Management Unit, where the vast majority of inmates housed are of the highest security level, it is impossible to ensure four turn-outs per day. Eighty percent of the inmates at the Special Management Unit must be brought, restrained, one at a time, to the law library. At the present time, they are able to access the law library greater than the minimum hours set forth in *Gluth*. Therefore, it is requested that SMU be allowed to continue to provide physical access to the law library in the manner they are presently operating.

At SMU, it is impossible to allow inmates to select their turn-out time. Presently, the SMU law library's average turn-out response time is within forty-eight hours. Turn-out requests to meet court deadlines are met daily. The current method of collecting requests for law library access at SMU is more efficient and workable at this facility than the manner ordered in *Gluth*.

I. "Check-Out" System.

Defendants object to allowing inmates direct access to the stacks. Pursuant to the *Gluth* Order, Defendants must document problems attributable to direct access to the stacks for particular inmates. Such a showing is virtually impossible, short of catching a particular inmate in the process of vandalizing legal materials.

Defendants submitted evidence at trial that vandalism does occur when inmates have direct access to the stacks. More importantly, the Plaintiffs presented no evidence that an inmate's ability to access the courts was impaired because of the denial of access to the stacks. The only evidence presented by the Plaintiffs at trials was from their expert, Jim Wilbur, who testified that it is more difficult to do legal research without browsing the shelves. Without evidence of inmates being unable to complete legal research because of the denial of access to the stacks, the Defendants should be able to continue with the "check-out" system. Complying with the *Gluth* Order at each unit would end up costing Defendants thousands of dollars for replacement of vandalized legal materials.

CONCLUSION

Defendants have submitted this Memorandum pursuant to this Court's Order of November 25, 1992. In addition to these objections, Defendants plan to submit additional objections and suggestions for modification pursuant to the Special Master's request by February 19, 1993. Defendants' objections and suggestions for modifications shall not be deemed a waiver of these Defendants' right to appeal prior rulings and orders of this Court or appeal from the subsequent final Order setting forth the injunctive relief regarding legal access issues.

DATED this 22nd day of January, 1993.

JONES, SKELTON & HOCHULI

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(Copy of Delivery List Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA

 (Title Omitted in Printing)

**PLAINTIFFS' PROPOSED FINDINGS OF FACT
 AND CONCLUSIONS OF LAW**

* * * *

(2) Lockdown prisoners at Tucson are allowed to keep legal materials for only twenty-four hours. Because of this restriction, they tend to request only one or two books at a time. (Joyner test., p.109, lines 20-25, p.110, lines 4-12)

f. Even lockdown prisoners who are intelligent, literate and legally trained are unable to do legal research under a paging system that allows only one or two books at a time every couple of days. In addition, the legal assistants assigned to lockdown prisoners are not sufficiently skilled to assist them. (Wilber test., p.124, lines 6-13, 25, p.125, lines 1-22; McQuillen test., p.131, lines 10-15)

6. The vast majority of adult prisoners incarcerated by ADOC have no adequate means to research the law, crystalize their issues, present their papers in a meaningful fashion, and get them filed in court. (Wilber test., p.109, lines 14-25)

B. Staffing

1. Many of the law libraries are staffed by security staff and prisoner law clerks. (Stip., p.18, ¶ B; p.10, ¶¶ 4a, 5a, 6a and b, 7a and b; Exh. 217, pp.25, 43, 49, 65 and 67A; Keeney test., p.68, lines 15-25, p.69, lines 1-4, p.26, lines 3-8, p.33, lines 12-17, p.34, lines 9-22)

2. The prisoner legal assistants, law clerks, and civilian library staff are responsible for providing legal services to all prisoners in the facilities. However, law clerks and library staff can assist prisoners only by giving them the requested material from the law library stacks, whereas legal assistants can help them draft pleadings and do other legal work. (Wilber test., p.152, lines 8-16; Exh. 216 (ADC Internal Management Policy 302.11), p.1, ¶ 5.2, p.8, ¶ 6.12.1.3; Cathcart test., p.115, line 25, p.116, lines 1-3; Joyner test., p.114, lines 17 -20.

3 ADOC recognizes a need for additional librarians, but requests for additional staff have been rejected. (Keeney dep., p.69, lines 15-25, p.70, line 1; Lewis dep., p.26, lines 3-8)

4. There is a specific need for more library staff to assist in providing library services to prisoners in lock-down at the Perryville facility. (Cathcart dep., p.69, lines 16 - 20; Cathcart test., p.114, lines 7-17)

5. There is an insufficient number of legal assistants available to assist prisoners who need legal assistance. (Doe I test., p.258, lines 13-25, p.259, lines 1-10; Stip., p.20, ¶ 5b; Johns test., p.103, lines 24-25, p.104, lines 1-7; Exh. 250c; Exh. 250p; McQuillen test., p.123, lines 2-4, p.124, lines 10-19; Bishop test., p.111, lines 1-7)

6. In many facilities there are no Spanish-speaking legal assistants or law clerks. (Johns test., p.105, lines 23-25; p.106, lines 1-11; Friego test., p.75, lines 21-22; Joyner test., p.100, lines 5-16; Cathcart dep., p.13, lines 1-4; McQuillen test., p.115, lines 11-12; Stip., p.19, ¶ 3c; p.21, ¶ 9b; p.22, ¶¶ 11 a and b; p.23, ¶¶ 13 a and b, 14 a and b); Exh. 250c; Exh. 40t)

a. Prisoners must rely on Spanish-speaking prisoners who are not law clerks or legal assistants to assist them

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IN THE UNITED STATES DISTRICT COURT DISTRICT OF ARIZONA

(Title Omitted in Printing)

DEFENDANTS' ADDITIONAL OBJECTIONS/ MODIFICATIONS TO IMPLEMENTATION OF THE GLUTH INJUNCTION TO PARTICULAR FACILITIES

Defendants, through counsel, pursuant to the Special Master's request, hereby submit the following additional objections and suggested modifications to the implementation of the *Gluth* Order to particular facilities. Defendants' objections and suggested modifications contained herein shall not be deemed a waiver of Defendants' right to appeal prior rulings, Findings of Fact and Conclusions of Law and Orders of this Court or appeal from the subsequent final order setting forth injunctive relief regarding legal access issues.

II. THE LEGAL ASSISTANT PROGRAM

(C) *Retention.*

Defendants suggest that a legal assistant must demonstrate at least minimal competence at one year *only* upon the receipt of complaints about his legal work.

(D) *Research Course.*

Defendants suggest the modification to the legal research and writing course to include a minimum of 25 hours of instruction provided in a four to six week period. Defendants recommend that the legal research course be offered to law clerks and legal assistants *only*. Even under this Court's liberal interpretation of *Bounds v.*

Smith, Defendants should not be required to offer the legal research course to inmates who have no intention of becoming a law clerk or a legal assistant. Finally, Defendants suggest that videotaped sessions of legal research courses be substituted for actual live classroom instruction. This modification is necessary to avoid the enormous cost of implementing such a legal research course ordered in *Gluth* at each unit in every facility within the state.¹

(F) *Operating Procedures.*

(1) Selecting a Legal Assistant.

Defendants request that a modification be made to allow Defendants the ability to participate fully in the selection process. Specifically, the *Gluth* Order only allows a denial of a request that a particular inmate act as another's legal assistant because of "mistake or ineligibility." However, the pairing of a particular legal assistant and inmate may create a threat to the safety and security of the institution.

For example, at the Special Management Unit, the majority of inmates are classified as I-5 and are sent to this facility because of their security status. There are, however, a few I-3s who are generally at SMU for a short period of time before transfer. Additionally, there are a few I-4 inmates whose institutional risk scores had recently been reduced and are awaiting transfer out of SMU. Defendants are concerned that I-5 inmates housed at SMU would utilize the legal assistant selection process as a manner in which to relay gang related information to inmates on other yards. It is imperative that Defendants be allowed to prevent the pairing of inmates at different institutional classification levels to control gang activity throughout the prison system.

¹ The estimated cost of implementing this legal training program system-wide is more fully set forth in Defendants' Motion for Stay filed on December 18, 1992, supplemented on December 31, 1992.

III. LEGAL SERVICES AND SUPPLIES.

(A) *Notary Service.*

Defendants request the requirement of providing notary services for legal papers and court related documents within twenty-four hours of a request be modified. Defendants should not be required to provide notary service to inmates on weekends or legal holidays.

(B) *Photocopying.*

Defendants request that this section be modified to allow the Defendants to increase the charge for per page copying upon a showing that five cents per page does not adequately cover the expense.

(C) *Typewriters.*

Defendants request this section be modified. While Defendants provide typewriters in all of their law libraries, they do not necessarily provide them at a ratio of 1:5 electric typewriters to law library capacity. There was no evidence presented by the Plaintiffs that Defendants did not provide an adequate number of typewriters. Clearly, there was no showing that the minimum requirement of 1:5 ratio of electric typewriters to law library capacity is required to provide inmates with adequate legal access to the courts. Therefore, Defendants request this section be modified and the last sentence of subsection 3(C) be removed.

IV. INDIGENT PRISONERS.

(E) *Response Procedure.*

Defendants request that this section be modified to include legal holidays within the reasons for a delay in processing a request.

V. LEGAL PHONE CALLS.

In response to the Court's Order that Defendants provide an unmonitored line to allow inmates to contact lawyers, Defendants suggest the following proposal. Each

unit contains a bank of phones that allow inmates to make calls outside of the facility. For security purposes, these lines are monitored. Defendants suggest that to comply with this Court's Order, one of the phones be used specifically for legal calls, with monitoring on that line to cease. Defendants request that they be allowed to take reasonable measures to ensure that the call being made is for legal purposes and that inmates found to be abusing the system be denied access to the legal phone.

VI. LAW LIBRARY COLLECTION.

Defendants continue to maintain that law library collections in their unit law libraries are more than adequate and exceed Constitutional requirements. Law libraries within the Arizona Department of Corrections do contain adequate self-help manuals. Additionally, many of the law libraries contain Pacific Reporters. Defendants, however, maintain that inmates can conduct adequate legal research without access to the Pacific Reporter.

DATED this 19th day of February, 1993.

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PLAINTIFFS' ACCESS TO COURT REMEDY FEBRUARY 19, 1993 PAGES 8-9

assistance on the most common legal issues. Defendants shall also prepare a Spanish language edition of the introductory guide. Defendants will review the proposed introductory guide and have an opportunity to make comments and/or suggest revisions. After approval by the Special Master, this guide shall be printed by defendants, and made available to all requesting prisoners while attending the law library.

G. Librarian

ADOC shall provide [at least] one full-time professionally trained supervisory librarian and adequate secretarial support for each facility complex with not more than four unit libraries or at least one full time librarian and adequate secretarial support for a law library which has no supervising librarian. Each unit law library, within a facility complex which has no unit law librarian, shall be staffed by at least one full time civilian employee who has completed the legal research course described in paragraph I.L.D. Subject to identified security needs, the librarian will be responsible for the policies and procedures in the law library and for ensuring adequate access to the courts for ADOC prisoners. The supervising librarian shall possess a library science degree, law degree, or paralegal degree. Librarians who have no prior experience or training in the use and administration of a library must complete an organized in-service legal training program developed by a person with a library science degree. Librarians who have not obtained a paralegal certificate or law degree must, in addition to the requirement that they be professionally trained, complete the legal research course offered to legal assistants. However, merely completing the legal research course for legal assistants will not, by itself, qualify a person to be a law librarian. The librarians shall be paid the standard salary

equal to that of other ADOC law librarians with additional amounts or incentives if necessitated by particular conditions at a given law library. The Special Master will work with ADOC on securing applicants, including contacting schools and professional organizations. The Court will consider modification of this requirement if, despite good faith efforts, a qualified candidate has not accepted a given position after two fiscal years. Non-professionally trained ADOC staff who are assigned to the law library to provide prisoners assistance in the use of the law library, shall complete either the legal research course for legal assistants.

H. Conduct

ADOC may require prisoners to remain in the law library for the full turnout period. After being warned when possible, a prisoner may be involuntarily removed from the library if he or she continues to create a threat to safety or security, or to directly interfere with others' use of the library. Within 48 hours of removal, the prisoner must be provided written notice of the reasons and factual basis for this decision, with a copy held for the Special Master. Non-intrusive actions, including reasonable

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IN THE UNITED STATES DISTRICT COURT DISTRICT OF ARIZONA

(Title Omitted in Printing)

DEFENDANTS' OBJECTIONS TO PLAINTIFFS' PROPOSED MODIFICATIONS

Defendants, through counsel, pursuant to the Special Master's request, hereby submit the following objections to Plaintiffs' proposed modifications to the *Gluth* order. Defendants address only the modifications proposed by Plaintiffs at this time. These objections shall not be deemed a waiver of Defendants' right to appeal any prior rulings or orders of the court as well as any subsequent orders of this Court.

II. THE LAW LIBRARY

C. Request Procedure

Defendants object to Plaintiffs' proposed language change in paragraph 2 of page 3. Plaintiffs propose to change the sentence regarding library turnouts from "this may be one day if necessary to meet a legal deadline" to, "this **shall** be **only** one day if necessary to meet a legal deadline." The proposed language change does not provide for situations where accommodating this request would simply be impossible due to staffing or scheduling difficulties. It should be the burden of the inmate to get to the library and complete his research in a timely manner.

D. *Response Procedure*

Defendants object to the Plaintiffs' suggested modification to this section which would require that each law library be equipped with a computer that is used primarily for scheduling law library turnouts. Defendants have objected to the necessity for utilizing a computer absent a showing of a scheduling problem at that particular law library. Additionally, law libraries on open yards where turnouts are not required should not have to be equipped with a computer for this purpose.

E. *Law Clerks*

Defendants object to the Plaintiffs' requested modification that law clerks shall be permitted to assist prisoners in drafting pleadings as long as this assistance does not interfere with the performance of other law clerk duties and responsibilities.

First, the *Gluth* order already requires that Defendants maintain a sufficient number of inmate legal assistants. If the Defendants are required to have a sufficient number of legal assistants to provide inmates with access to the courts, it should not be necessary for Defendants to permit law clerks to assist prisoners in drafting pleadings. Second, law clerks are paid by the Defendants for their services. As many, if not the majority of inmate lawsuits are directed against the State, it would be ridiculous to order the State to pay for the preparation of lawsuits against itself. Third, it would be difficult to recruit legal assistants, because inmates would more likely want to be a paid law clerk who can perform legal assistant functions. Finally, it is unlikely that an inmate law clerk would be able to perform legal assistant functions without having it interfere with the performance of other law clerk duties and responsibilities.

Defendants also object to the Plaintiffs' proposed modification which would impose the current ratio of prisoner law library clerks to prisoner population at the Central

Unit to all law libraries throughout the Arizona Department of Corrections. Obviously, if law library usage at a particular facility is less than usage at the Central law library, Defendants should not be required to conform with the ratio established at the Central Unit. The ratio of inmates using the law library at the Central Unit facility will be much higher than, for example, the ratio of inmates that utilize the law library at the women's division in Florence. Additionally, Defendants maintain that the decision regarding the necessary amount of law library clerks should be one left to the discretion of the librarian or staff member in charge of a particular library. Finally, there was no evidence in this case that there was a deficient number of law library clerks at any of the law libraries.

F. *Research Guide*

Defendants object to the Plaintiffs' proposed modification requiring them to prepare a Spanish language edition of an introductory guide. Defendants anticipate that the cost of translating the introductory guide will be excessive, and certainly not necessary in light of the fact that Defendants most likely will be ordered to provide Spanish speaking legal clerks and legal assistants for Spanish speaking inmates.

G. *Librarian*

Defendants object to Plaintiffs' proposed modifications throughout subsection G as being incomprehensible. Defendants submit that there was no showing by the Plaintiffs in this case that there were deficiencies resulting from the current law library staffing.

I. *"Check-Out" System*

Defendants object to the Plaintiffs' proposed addition to the check-out system granting all inmates access to the stacks unless there is a specific documented problem

involving that particular prisoner justifying the denial of access. Plaintiffs' presented no evidence that an inmate was denied access to the courts as a result of not being able to directly access the stacks. Additionally, Plaintiffs' proposal is unworkable. It would be virtually impossible for Defendants to pinpoint exactly which inmates were vandalizing books in the law libraries.

K. *Paging System*

Defendants object to Plaintiffs' proposed modification to increase the number of books provided to inmates who have no access to the law library. Such a provision will result in delays in other inmates' requests to obtain legal materials.

L. *Law Library Inventory*

At the present time, Defendants already have sufficient law library inventories. Plaintiffs' own expert, James Wilber, upon reviewing Defendants' law library at Perryville, stated that it was the best prison law library he had ever seen.

Although most of the law libraries already have *Prisoner's Self-Help Litigation Manual* and *Post-Conviction Remedies* by Manville, there was no showing by the Plaintiffs that failure to have any of the additional editions impeded inmates access to the courts. Certainly, Defendants should not have to provide inmates with *Immigration Law and Crimes*.

Plaintiffs made no showing that Pacific Second Digests and Reporters are necessary. Should the Special Master require Pacific Second Digests and Reporters, the libraries should be allowed to discontinue the Arizona Reporters and Digest, due to the fact that all the cases in the Arizona Reporters are also included in Pacific Second Reporters.

II. THE LEGAL ASSISTANT PROGRAM

B. *Number*

Defendants object to Plaintiffs' proposed modification to subsection B, "ADOC shall ensure that prisoners having meaningful access to bilingual legal assistants." This language is unnecessary and is already implicit in the *Gluth* order.

C. *Retention*

Defendants object to the Plaintiffs' modifications to this section. Supervising the work of legal assistants on a continuing basis would require several full-time legal research instructors. The work of a legal assistant need only be supervised or reviewed upon specific complaints about that particular legal assistant's work.

Defendants object to Plaintiffs' request for modification seeking a limitation on when a prisoner's legal assistant status may be terminated. According to the Plaintiffs, an inmate legal assistant can be guilty of a serious crime or infraction within the prison, and would still be allowed to continue as a legal assistant as long as that crime didn't have anything to do with his or her work as a legal assistant. Surely, Defendants should not be required to keep an inmate on as a legal assistant who was involved in a stabbing of another inmate. This modification is an undue restriction on the Defendants' right to administer prisons in a fashion necessary to maintain security and safety of the inmates, Defendants' employees and the general public.

D. *Research Course*

Defendants should only be required to offer the legal research and writing course for inmates interested in becoming legal assistants. To force the Defendants to offer the legal research and writing course for any interested inmate clearly goes beyond the scope of what is required by the Constitution.

Defendants object to the inclusion of covering immigration law in the legal research course, for reasons previously stated.

F. *Operating Procedures*

2. *Meetings*

Defendants object to the Plaintiffs' requested modification that an inmate in any custody level shall request a meeting with his or her legal assistant. Defendants should have the right to limit specific requests for security reasons. For example, an inmate who was classified as an I-5 should not be able to request an inmate classified as an I-3 to be his legal assistant.

Defendants also object to the Plaintiffs' proposed modification that an appropriate request procedure be developed for illiterate and non-English speaking prisoners. Plaintiffs failed to present any evidence that illiterate or non-English speaking prisoners inmates were having difficulty requesting a legal assistant.

Defendants also object to Plaintiffs shortening the amount of time in which the Defendants must arrange a meeting to within 48 hours of a request.

Defendants object to the remainder of Plaintiffs' requested modifications of this section as being unworkable for security reasons. Defendants should not be forced to allow face to face meetings, especially in high security level facilities and lockdown units. Additionally, Defendants should be able to terminate these meetings if it is evident that the meeting has nothing to do with a legal matter.

5. *Disclosure*

Defendants object to Plaintiffs' suggested modification that Defendants must first go to the Special Master before asking a legal assistant to reveal information derived from the inmate legal assistant relationship when prompted

by serious concern of institutional safety or security. This requirement puts the Special Master in the role of a prison administrator. There is no privilege attached to conversations between a legal assistant and inmate. Therefore, there is no reason why Defendants should need to get the approval of the Special Master before seeking information from the legal assistant when there is a serious concern of institutional safety or security. It is also likely that such a requirement would impede the ability of the Defendants to obtain this information on a timely basis, which would be necessary in the vast majority of instances.

Defendants also object to the Plaintiffs' suggested modification that meetings and discussions between an inmate and his or her legal assistant should not be arbitrarily terminated based on eavesdropping. If staff members inadvertently overhear conversations that prompt a concern of institutional safety or security or that clearly have nothing to do with legal related matters, staff members should be able to terminate the meeting.

III. LEGAL SERVICES AND SUPPLIES

B. *Photocopying*

Defendants object to the proposed modification that a sign be posted in the law library near the photocopier which states that the reading of a prisoner's confidential legal papers is impermissible and will be punished. The requirement that Defendants advise individuals involved in photocopying not to read materials is sufficient. Posting a sign to the effect that reading confidential legal papers will be punished will only create numerous disputes and problems and is not necessary.

V. LEGAL TELEPHONE CALLS

Defendants object to Plaintiffs' proposed modification regarding legal telephone calls. Plaintiffs' request that inmates be provided unhindered access to telephones for

legal calls with virtually no restriction will only create numerous problems and will place an extreme burden on the Defendants.

There is no reason why the vast majority of communication between inmates and their attorneys cannot be conducted by mail. Pursuant to Plaintiffs' procedure, an inmate can request as many legal telephone calls as they want with virtually no restrictions. If Plaintiffs' modification is ordered, inmates will be able to abuse this system in many ways, without the Defendants having any recourse.

DATED this 19th day of March, 1993.

JONES, SKELTON & HOCHULI

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(Copy of Delivery List Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(Title Omitted in Printing)

**DEFENDANTS' ADDITIONAL OBJECTIONS
TO PLAINTIFFS' PROPOSED MODIFICATIONS**

Pursuant to the Special Master's request, Defendants, through counsel, submit additional objections and modifications regarding implementing the *Gluth* order at various units. Defendants' objections, suggestions or modifications shall not be deemed a waiver of these Defendants' right to appeal prior rulings and orders of the court or appeal from the subsequent final order setting forth the injunctive relief regarding legal access issues.

II. THE LEGAL ASSISTANT PROGRAM

E. Responsibilities

Defendants object to allowing inmate legal assistants to meet face to face with other inmates at the following units; SMU, CB-6, Alhambra, Perryville Santa Maria SMA and all lockdown units. Defendants object to a requirement of face to face meetings between legal assistants and inmates for security reasons. Additionally, Defendants submit that meetings between prisoners and legal assistants which occur with a barrier are just as productive as face to face meetings. Finally, Defendants submit that inmates do not have a constitutional right to have a face to face meeting with their inmate legal assistant.

V. LEGAL TELEPHONE CALLS

Defendants submit that inmates be allowed to request a maximum of two (2) twenty (20) minute phone calls per week to an attorney or attorney's representative for

the purposes of seeking legal assistance. Defendants submit that a call that is uncompleted will not be counted as one of the designated calls per week.

DATED this 28th day of April, 1993.

JONES, SKELTON & HOCHULI

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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA

 (Title Omitted in Printing)

ORDER

At the request of the Special Master this Court has determined that a clarification of its referral order is necessary in this case. Defendants have objected to a number of the fees and expenses billed by the Assistant Special Master. Specifically, the Special Master has forwarded to the Court a copy of a letter from defense counsel dated April 20, 1993 raising specific objections to payment. Having reviewed the letter the Court has determined that it is necessary to clarify the procedure for the defendants to object to billing of the Special Master and Assistant Special Master. The Court has also determined that it is necessary to clarify some specifics regarding

* * * *

The Court expects the Special Master to bill the defendants for local office space based on the history of the Special Master and his actions in the *Gluth* case. When the Court first appointed the Special Master, he discussed the provision of a local office with defense counsel in *Gluth*. The Special Master took the position that the defendants had the responsibility of providing office space and the Special Master and Assistant Attorney General worked out a compromise that the Special Master would pay a portion of the office space out of his hourly rate.³

³ At that time, the Assistant Special Master was not a practicing attorney. Although she is now a practicing attorney, her practice time is greatly limited by this case.

Thus, the defendants have always paid a portion of the office space. The Court considers this to be a "necessary and proper" expense under Federal Rule of Civil Procedure 53 because the Special Master requires a local office. The Court also notes that the volume of paperwork and documents provided to the Special Master require additional office space. The Court further notes that it considered the fact that the Assistant Special Master would be reimbursed for a portion of her office expense when setting her hourly fee at a rate below the state contract attorney hourly fee.

Second, the defendants make an objection that the Assistant Special Master spent what they consider to be an "excessive amount of time" interviewing inmates at facilities. In particular, the defendants object to the Assistant Special Master interviewing two inmates at the Rynning Unit for a period of three hours. Yet, defendants should be aware that, due to security concerns, the

* * * *

Within 20 days of the Special and Assistant Special Master's submission of billing, the defendants may object to the Special or Assistant Special Master's expenses or costs. If the defendants and Special Master cannot resolve the dispute, the defendants may submit a written objection to the Court setting forth the specific cost or expense and their objection to that cost or expense. The Special Master may respond to the written objection within 20 days of the filing of the defendants' objection.

DATED this 27 day of May, 1993.

/s/ C.A. Muecke
C.A. MUECKE
U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(Title Omitted in Printing)

**DEFENDANTS' OBJECTIONS TO THE
SPECIAL MASTER'S PROPOSED ORDER**

Defendants, through counsel, hereby submit the following objections to the Special Master's proposed order submitted on July 12, 1993. Defendants' objections shall not be deemed a waiver of these Defendants' right to appeal prior rulings and orders of this Court or appeal from the subsequent final order setting forth the injunctive relief regarding legal access issues.

I. THE LAW LIBRARIES

In the proposed order, the Special Master references the "existing Aspen DWI and Florence units of ASPC-Phoenix". Defendants suspect that the Special Master is referring to the Flamenco unit at ASPC-Phoenix.

B. SCHEDULE

1. Library Hours

a. Facilities that do not require advance requests for a library turn-out:

The Defendants object to the requirement that the law library be open for inmate use at least four hours each week night between 5:00 p.m. and 10 p.m. At the majority of the Defendants' facilities, a final count is conducted and the yards are closed by 8:30 p.m. Defendants recommend that the libraries be open no later than 8:00 p.m. This would still allow inmates that are working

during the day to attend the library at least ten hours per week. A requirement that the law libraries stay open after 8:00 p.m. would require additional staffing and law clerks at all facilities. Defendants also object to requiring the law libraries to be open on legal holidays.

b. Facilities that require advance requests for a library turn-out:

Defendants again object to requiring the law library to be open after 8:00 p.m. For example, the law library at CB6 currently satisfies all inmates requests for library time by 3:00 p.m. Therefore, it should not be necessary for that library to remain open until the minimum of 9:00 p.m. as set forth in the proposed order. Defendants also object to requiring the law library be open on legal holidays.

2. Prisoner Use

Defendants object to the first sentence of the proposed order. In an open yard, if an inmate were to arrive at the law library ½ hour before closing, he or she could demand that pursuant to the order, he or she be allowed to stay for a minimum of 2 hours of actual library use. Defendants suggest that the first sentence be changed to "in all facilities that require advanced requests for library turn-out, each visit or turnout must provide the prisoner a minimum of two hours of actual library use."

3. Notice

Defendants object to inclusion of this section in the order. It is not clear why the Defendants have to make known to all prisoners the specific schedule of important activities at the facility for the next month, including visiting hours, classes, religious services and field turnouts for each housing area or how this relates to legal access. Additionally, Defendants object to the order providing that the Defendants give the Special Master a schedule

of ongoing activities that might conflict with law library access, including work assignments, classes, recreation, religious services, commissary, visiting and meals. Because the Special Master has already proposed a law library schedule, it is unclear why this information is needed.

C. ADVANCE REQUEST PROCEDURE

Defendants object to prisoners being responsible for selecting their law library turnouts at CB6 and SMU. Because of the security concerns unique to these maximum level facilities, it is necessary that the staff schedule the law library turnouts.

D. ADVANCE RESPONSE PROCEDURE

Defendants object to requiring that the law library in CB6 be equipped with a computer. Because of the low number of inmates that actually use the library at CB6, a computer is not necessary for scheduling turnouts. Additionally, because of security concerns, the inmates at SMU and CB6 cannot be given notice of scheduled law library turnouts. Finally, CB6 and SMU request that the current scheduling be left intact, as there are virtually no complaints regarding the scheduling at CB6 and there have been no complaints regarding the scheduling system at SMU.

E. LAW CLERKS

Defendants object to the requirement that at least two law clerks be assigned for each turnout. There is not need for two law clerks in small unit law libraries such as the Florence Women's Division or in CB6. Additionally, because of the small number of inmates that use the CB6 law library or the SMU library at one time, it is not necessary that two clerks be present at each turnout.

F. RESEARCH GUIDE

Defendants propose that they be allowed to prepare the introductory guide to the use of the law library, with the Special Master having an opportunity to comment on the proposed introductory guide and be allowed final approval.

G. LIBRARIAN

Defendants object to the requirement that each law library provide one full-time professionally trained librarian. Defendants suggest that a librarian at each library is not necessary and recommends that a minimum of one law librarian be provided for every three law libraries.

Defendants also object to the requirement that each ADOC complex employ a professionally trained librarian with a law degree or a paralegal degree. Defendants have a difficult enough time filling librarian positions in facilities, without having to meet this requirement. The prospects of even hiring one librarian with these qualifications are slim indeed. Not only will it be impossible to find librarians with these qualifications, in light of the ordered legal assistant program, such a requirement is not necessary.

H. CONDUCT

Defendants object to the Special Master's proposal that inmates not be required to remain in the law library for a full turnout when they are attending the library solely for supplies, notary or copy services for the reason that Defendants lack appropriate numbers of security staff to accommodate this proposal.

I. "CHECK OUT" SYSTEM

Defendants object to the apparent requirement that prisoners in maximum security institutions be denied direct access only if ADOC documents vandalism or losses

resulting from such access in that institution. Obviously, for security concerns, inmates at SMU and CB6 cannot be allowed access to the stacks. Although the Defendants believe that the Special Master did not intend these facilities to be included, it is not clear. Defendants also object to being required to allow inmates in minimum or medium security facilities direct access to the stacks when there is documented vandalism and loss resulting from this access. As there was no evidence from inmates at the trial that there was any denial of access to the courts as a result of the check-out system, Defendants request that they be allowed to continue with this system, especially in light of the documented vandalism that occurred as a result of the direct access to the stacks.

K. PAGING SYSTEM

Defendants object to requiring a daily exchange between prisoners and a law library representative regarding research. Due to staffing problems, such a daily exchange is impossible. Defendants suggest that this exchange take place a minimum of every 48 hours.

L. INVENTORY

Defendants object to the requirement of Pacific Reporters and Digests. In the alternative, Defendants suggest that they only be required to provide an up-to-date set of Pacific Second Reporters and Digest and they not be required to provide Pacific First Reporters. Defendants also recommend that each facility maintain a set of Pacific Reporters that could be utilized by inmates at the unit law libraries if needed. Finally, Defendants object to having to provide any materials regarding immigration practice, as no case interpreting *Bounds* requires that a prison law library contain these types of materials.

II. THE LEGAL ASSISTANCE PROGRAM

Defendants object to the continuing nature of the Legal Assistance Program. Defendants submit that once a specific number of legal assistants have completed the training program, Defendants should be able to suspend that program. Defendants submit that providing a legal assistant training program every six months is unnecessary in achieving the Court's goal of providing trained legal assistants to inmates for access to the courts. Pursuant to this order, the Defendants are required to run training programs every six months, whether any inmates are interested in taking the course or not. Defendants should not have to continue offering the course if there are sufficient numbers of legal assistants available at that unit to provide inmates with access to the courts.

F. OPERATING PROCEDURES

1. *Selecting a Legal Assistant*

Defendants object to the last portion of the first sentence of this section "this process shall not require information about the legal concerns" for the reason that the meaning of this sentence is unclear.

2. *Meetings*

Defendants object to the requirement that inmates be allowed to meet with their legal assistant for a minimum of three hours per week. This requirement is impossible at the SMU and CB6 due to staffing problems and lack of available space.

5. *Disclosure*

Defendants object to the inclusion of "monitoring" with regard to meetings and discussions between a prisoner and his or her legal assistant. Obviously, the Defendants need to monitor these meetings. Defendants are able to moni-

tor these meetings without listening to the discussions between the prisoner and his legal assistant.

I. TELEPHONE CALLS

Defendants object to the weekly minimum of three 20-minutes calls allowed inmates, which would require additional staff. Defendants also want to make clear that although inmates will be allowed phone calls, the Defendants will not pay for them. Inmates should either call collect or have to pay for the call.

Defendants also object to the requirement that brief incoming telephone messages from an attorney representative be timely delivered to inmates. Defendants have enough of a problem with staffing shortages without having to worry about delivering messages to inmates when other methods of communication are available.

III. LEGAL SERVICES AND SUPPLIES

B. PHOTOCOPYING

Currently, the cost of making a copy is approximately eight cents per page. Defendants request that this order provide for a mechanism by which the reasonable rate for copying service be increased on a periodic basis. Obviously, it is difficult to determine what the cost of making a copy will be in twenty years. Defendants should not be stuck with being able to charge only five cents per page.

C. TYPEWRITERS

Defendants object to the requirement that inmates be allowed to possess a storage memory for their typewriters for security reasons. Defendants also object to the requirement that they provide typewriters for inmate use. Additionally, Defendants object to the requirement that the typewriters be covered by a service contract or other professional repair system. For example, due to the cost of a service contract, it may be more cost-effective to pur-

chase a new typewriter rather than maintain a service contract.

IV. INDIGENT PRISONERS

B. SUPPLIES AND SERVICES

1. Supplies

Defendants object to having to provide a minimum amount of items for inmates each week. Certain items, such as pencils and pens, can be exchanged by the inmate when a new one is needed. Additionally, Defendants object to being required to provide one typewriter ribbon and ko-rec-type each week. First, it is unlikely that these items will need to be replaced on a weekly basis. Second, it is unreasonable to require that the Defendants keep in stock the numerous varieties of typewriter ribbon and ko-rec-type on the market.

2. Postage

Defendants object to the requirement that postage be provided for inmate letters to "organizations." Defendants recommend that this requirement be changed to "legal organizations."

DATED this 13th day of August, 1993.

JONES, SKELTON & HOCHULI

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

(Title Omitted in Printing)

ORDER

Having considered plaintiffs' motion to dismiss defendants' objections dated August 13, 1993, the Court concludes as follows:

Background

Plaintiffs have moved to dismiss defendants objections filed August 13, 1993 to the Special Master's proposed order arguing that they were filed in contravention of the Court's November 25, 1992 order. Defendants respond that they have complied with the November 25, 1992 order.

On November 25, 1992, this Court issued an order in this case setting forth the duties of the Special Master and the parties in formulating and implementing the permanent injunction. The Order of

* * * *

are not untimely because they were filed after the ten-day period.

However, to the extent that the defendants raise objections in those final objections that were not raised to the Special Master on January 22, February 19, March 19, April 28, 1993 or at the meeting with the Special Master on April 7, 1993, the Special Master need not consider those objections in forming the proposed final injunction in this case. The parties were allowed over six months to file written objections to implementation of *Gluth* statewide. Defendants have had ample opportunities and time to request proposed changes to the *Gluth* injunction. The

special master's proposed order contains no proposals that could not have been anticipated or were not contemplated in the April 7, 1993 meeting with the Special Master. For any new objection raised for the first time after the proposed injunction, the Special Master has the discretion to consider the new objection at this time or during implementation of the permanent injunction. The Special Master will be monitoring implementation of the permanent injunction. As such, this Court is willing to allow modifications for documented problems that occur during implementation. Thus, if there is evidence that a particular portion of the injunction should be modified, the Special Master has the discretion to suggest the modification to the Court. This Court is willing to make changes to accommodate the defendants if good reasons exist for making the changes. However, such changes will not be made based on unsupported allegations.

Plaintiffs also argue that defendants provide no evidence to support their conclusions that are the basis for their objections. Defendants respond that they are not required to provide documents to support their objections. However, the Order of November 25, 1992 specifically provides that:

No later than January 22, 1993, the parties shall file written objections, if any, setting forth their objections to implementation of the *Gluth* injunction in particular facilities. The objections shall set forth the particular provisions of the injunction to which they object; propose modifications to the injunction and set forth the particular circumstances that require modification of the injunction. *The particular needs or circumstances must be documented and supported by evidence.*

Order of November 25, 1992 (emphasis added).

This Court is willing to provide modifications from the *Gluth* order for particular prison units based on differ-

ences in those units or for other considerations raised by defendants. However, the particular needs or circumstances must be documented and supported by evidence. This Court will not modify the *Gluth* injunction based only on allegations that are not supported by evidence.

IT IS THEREFORE ORDERED THAT the Plaintiffs' motion to Dismiss Objections (filed September 7, 1993) is denied. However, in his preparation of the final injunction, the Special Master has the discretion to disregard any objections or claims that were made for the first time in the final objections filed on August 13, 1993 and any objections that are not supported by evidence.

DATED this 27th day of September, 1993.

/s/ C. A. Muecke
C. A. MUECKE
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

(Title Omitted in Printing)

EXCERPTED DEPOSITION OF
STARLA JOY CATHCART

Perryville, Arizona

January 31, 1991

* * * *

[27] A: They weren't—not any definite plans, other than on-the-job training on each unit.

Q: Do you have a plan for on-the-job training?

A: Whether the people above me have or not, I don't know.

Q: Do any of your current law clerks have any prior experience being law clerks?

A: I know that one at San Juan has previously worked in a law library at another unit, or one of the other complexes, but I don't remember which one. And I don't know about the others.

Q: Do you know how many legal assistants there are available to prisoners at the Perryville facility?

A: No, I don't know.

Q: Do you know whether or not legal assistants are provided any training?

A: I don't know.

Q: Do you know what the procedure is for a locked-down prisoner to obtain legal material?

A: They make the request. When the request gets to me, then I fill out a form saying what I'm sending to them, and either I or one of the other librarians takes it to them. And then they get it for 24 hours, if it's a book. Legal supplies or forms and stuff, we send for them to keep.

Q: Do you know how long it takes for the request to [28] get to you?

A: It varies.

Q: From when to when?

A: Well, I can get it the same day or it may be weeks.

Q: Do you know what accounts for the delay of a week or weeks?

A: Whoever they gave it to just doesn't pass it on, I guess. I have no idea what happens.

Q: How do you know that there is a delay?

A: The inmate tells me. Or I may see it on the—if there is a date on the request I may, you know, tell that way that there's been a delay.

Q: How specific must the request be in order for it to be filled?

A: I just have to have an idea of what they want. They don't have to say, "I want such-and-such a book." Although, you know, it helps if they do, because then I can give them that book. But if they just, like they may say, "I want a book on plea bargains or I may want a book on 1983," or something like this, you know, you know what they want, so I get it for them.

Q: Does someone daily go over to the lockdown unit to obtain requests from prisoners, or is someone sent over there only when a request comes?

[29] MR. CULLAN: Object to foundation.

If you know, you can answer the question.

A: I don't really know what their visiting schedules are, but the requests a lot of times come through the counselors. But I don't know what their visiting schedule is.

Q: Who is responsible for filling the request, actually taking the legal materials over to the lockdown unit? Who does that?

A: As I say, it's either myself or one of the other librarians.

Q: What's the maximum amount of material per request a prisoner can obtain?

A. We have been limiting it to one book at a time when it's from Complex. Because of the fact, mostly because the other librarians have other books that they have to carry and it makes, you know, if you have a bunch of them, then it's too big of a load. If there is only one request and it's one person requesting, and it's something that goes together, you know, two books, then they go together.

Q. And the prisoner is allowed to keep that material for a maximum of 24 hours per request?

A. Yes.

* * * *

[31] MR. CULLAN: Object. It calls for speculation.

You can answer it, if you know

A. They haven't told me anything to the contrary. If I get a request I don't understand, then if I can, I go talk to the prisoner or I try to get it clarified.

Q. BY MR. ADAMS: Do you know how long a prisoner has to be in lockdown in order to be eligible to receive legal material?

MR. CULLAN: Object. Lack of foundation.

You can answer, if you know.

A. I believe the policy says two weeks, that they have—if they are going to be locked down more than two weeks, then they have to have access.

Q. BY MR. ADAMS: Do you know whether or not in order to receive legal assistance, not simply books, legal materials, but assistance from an assistant, whether or not the prisoner has to have a pending disciplinary charge?

MR. CULLAN: I object to foundation.

A. I don't know anything about the legal assistant program.

Q. BY MR. ADAMS: Who supervises legal assistants?

MR. CULLAN: Object on foundation.

A. It's—all I know, it's done on the units. That's all I know.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

(Title Omitted in Printing)

EXCERPTED DEPOSITION OF
ARABELLA ANN MAXEY JOYNER

Tucson, Arizona

October 26, 1990

* * * *

[38] Q. Now, if a prisoner in CDU wants a certain case, is the book brought to him, or a copy of the case?

A. A copy of the case, if he requests a certain case.

Q. And does he have to pay for the photocopy of that case?

A. If he is indigent, no. If he is not indigent, he—we are not totally consistent on that. Sometimes we just go ahead and copy the case, with the understanding that he will return it to us.

If it's something that he feels that he needs, we will send a funds disbursement. He has an option of whether or not he wants to have the case and copy the case, in which case he fills out a funds disbursement, or whether he wants to have it for a week and send it back. And then we keep a file of the ones that are frequently requested.

Q. Now, when he requests a case, does he have to know the cite of the case?

A. Yes, or give us a very good lead. And if they will give us a good lead, we have even Shepardized.

Q. When you say, "give a good lead," what do you mean?

A. This area, I think it may be in there, in there. Things pertaining to—whatever.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

(Title Omitted in Printing)

EXCERPTED DEPOSITION OF J. C. KEENEY

Phoenix, Arizona

November 14, 1990

* * * *

[77] Q. Why was that?

A. Probably an order out of Gluth, one of the early orders.

Q. For the CSOs who staff the law libraries, do they receive any training before they assume that duty?

A. I don't know.

Q. Do they receive any testing before they assume that duty?

A. I don't know that either.

Q. Is there any statewide policy on either training or testing for CSOs in law libraries?

A. No.

Q. How about the prisoner clerks to work in the law library, do they receive any training before they assume that post?

A. I don't know that.

Q. Do they receive any testing before they assume that post?

A. I don't know that either.

Q. Is there a statewide policy on training or testing for prisoner law library clerks?

A. Not that I am aware of.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

(Title Omitted in Printing)

**EXCERPTED DEPOSITION OF
STEVEN KENNETH SLOBODA**

Douglas, Arizona

October 29, 1990

* * * *

[33] Q. Let me go back up to the library just for one minute. Is there a limit placed on the numbers of prisoners that can be in either one of the law libraries?

A. Not that I am aware of, no.

Q. Have you heard of any complaints from prisoners or staff that prisoners are having problems getting access to the law library?

A. No.

Q. For the prisoners in lockup, you indicated that they have to make a request and that request is filled within 24 hours?

A. Uh-huh.

Q. You are saying "yes"?

A. Yes.

Q. How specific do they have to make their requests in order to get it filled? Do they have to give the cite of the case that they want?

A. Yes, I believe they do.

Q. Is there, to your knowledge, a law clerk assigned to the segregation unit?

A. No.

Q. No, there is not?

A. No, there is not.

* * * *

TRIAL TRANSCRIPT

November 22, 1991

* * * *

[198] A: It says:

"Arizona Department of Corrections Summary of Education Activity."

And then down in the middle it says:

"Reception test data, September 1989, Reading Scores Wide Range Achievement Test."

And then lists what looks like to be test results from a reading test.

Q: Does that document, from your review, indicate what the reading levels are at Department of Corrections, of the prisoners?

A: It indicates that, if I'm reading this correctly, of the—that 15 percent of the prisoners read at grade level three, four percent at grade level four, five percent at grade level five, four percent at grade level six, seven percent at grade level seven, 11 percent at grade level eight—

Q: If I do—

A: —etcetera.

Q: —a quick addition here, does that comes up to about 46 percent of prisoners read at a grade level of 8th grade or less?

A: 18, 27, 31, yes. According to this it would be 46 percent are 8th grade reading level or less. Yes.

Q: From your experience, a prisoner who reads at an 8th [199] grade level, how does that impact on his or her ability to use a law library?

A: There's no way a prisoner with an 8th grade reading level can adequately use a law library, or anyone, in my opinion, in my experience.

MR. ADAMS: The Court's indulgence.

(Pause)

MR. ADAMS: No further questions.

MR. STRUCK: No questions, Your Honor.

THE COURT: None? All right. Thank you. You're excused.

THE WITNESS: Thank you.

THE COURT: You want the witness excused for—

MS. AIYETORO: Yes, Your Honor.

THE COURT: Okay. Any objection?

MR. STRUCK: No objection.

THE COURT: All right. Okay. Next witness please.

MS. AIYETORO: Your Honor, we have no more witnesses for today. We will have Dr. Charles Braslow on Monday morning.

THE COURT: Well, okay. Anything else we need to take care of?

MS. AIYETORO: No.

THE COURT: Do try to have witnesses here though because, you know, the time is precious.

* * * *

TRIAL TRANSCRIPT

December 18, 1991

* * * *

[282] Q: And the postmark was long—

A: 20 days prior.

Q: And was the letter properly addressed?

A: Yes, it was.

Q: Now have you ever been a disciplinary representative?

A: Yes, I have.

Q: What does a disciplinary representative do specifically?

A: They assist other inmates in the preparation of their case before the disciplinary—institutional disciplinary proceedings.

Q: Okay. Now how do you get to be a disciplinary representative?

A: You apply.

Q: And do you have to take an examination?

A: No.

Q: Do you receive any training?

A: No.

Q: Do you receive any training in the law library use?

A: No.

MS. BENDHEIM: Now, Your Honor, at this point I would move to the offer of proof.

THE COURT: All right.

BY MS. BENDHEIM:

Q: Are you acquainted with Doreen Romney?

A: Yes, I am.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SAMUEL LEWIS, *et al.*,
v. *Petitioners,*

FLETCHER CASEY, JR., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE PETITIONERS

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QUESTION PRESENTED

Whether the district court's order in this "access to courts" case, which greatly expands the State of Arizona's financial and administrative burdens and shifts much of the management of the State's prison system to the federal judiciary, exceeds the constitutional requirements set forth in *Bounds v. Smith*, 430 U.S. 817 (1977).*

* Petitioners are the following prison officials of the Arizona Department of Corrections: Samuel A. Lewis, Director; Warden Robert Goldsmith, Arizona State Prison Complex, Florence; Warden William Rhode, Arizona State Prison Complex, Perryville; Warden George Herman, Arizona State Prison Complex, Douglas; Warden Roger Crist, Arizona State Prison Complex, Tucson; Warden Hal Cardin, Arizona State Prison Complex, Phoenix.

Respondents include twenty-two class representatives, on behalf of themselves and all other similarly situated as inmates in the Arizona Department of Corrections. The twenty-two representative plaintiffs are Fletcher Casey, Jr., Stephen James, Frank Bartholic, Armando Munoz, Kyle Baptisto, David A. Mann, Jeffrey Lustig, Terry Don McFalls, Randy Sampson, John Tomlin, Scott Tramosch, Pamela McQuillen, Carolyn Ferguson, Yvonne Martin, David Tucker, Susan Colker, John Myers, Mary Jo Booker, Randy Thomas, Ruth Johnson, Roman Stone, and Robert Bankston.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1511

SAMUEL LEWIS, *et al.*,
v. *Petitioners,*

FLETCHER CASEY, JR., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals is reported at 43 F.3d 1261; Pet. App. A at 1a. The opinion of the district court is reported at 834 F. Supp. 1553; Pet. App. B at 19a. The district court's October 13, 1993 permanent injunction (Pet. App. C at 57a) is unreported, and was stayed by this Court in an order published at 114 S. Ct. 1638; Pet. App. D at 86a.

JURISDICTION

The district court's jurisdiction was invoked under 42 U.S.C. § 1343(3) (1991) and 28 U.S.C. § 1331 (1993). The United States Court of Appeals for the Ninth Circuit entered its judgment on December 27, 1994. The Peti-

tion for Writ of Certiorari was filed in this Court on March 14, 1995, and was granted on May 22, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1993).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides, in relevant part:

[N]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an inmate "access to the courts" class action against Petitioners, who are prison administrators for the Arizona Department of Corrections ("ADOC"). Although Arizona provides its inmates with access to dozens of law libraries across the State, each stocked with an impressive array of legal materials, plus support from inmate law clerks and legal assistants, the Hon. Carl A. Muecke, District Judge for the District of Arizona, held that Arizona's program was insufficient to satisfy the inmates' right of access to the courts under *Bounds v. Smith*, 430 U.S. 817 (1977). Without identifying any system-wide constitutional violation, the district court nevertheless issued a minutely detailed, system-wide injunction that administers essentially all aspects of Arizona's program of providing inmates access to the courts.

The Ninth Circuit affirmed. The issues before this Court are whether the lower courts erred in finding a constitutional violation at all, and whether the lower courts' system-wide and intrusive injunction is invalidly overbroad and so far exceeds the requirements of the Constitution as to usurp the State's executive power to administer the law and its legislative power to spend, in violation of principles of both federalism and separation of powers.

1. Arizona's Prison System.

The Arizona prison system consists of nine separate complexes spread across the State, each of which contains several individual housing units. R.T. 1/27/92 at 11-12. At the time of trial in 1992, Arizona housed 15,346 inmates, and had 26 law libraries. *Id.* Since then, the system has expanded to more than 22,000 inmates and 33 law libraries. Libraries are located at each of the nine prison complexes. In most cases, each housing unit has its own separate law library. Inmates in housing units without libraries have access to libraries in adjacent housing units within the complex. R.T. 1/14/92 at 92-93; J.A. 182-184.

2. Arizona's Policies and Practices Regarding Inmate Access to the Courts.

ADOC devotes considerable resources and personnel to providing inmates with law libraries, legal assistants, and basic supplies so that inmates can have meaningful access to the courts. The policies and practices are summarized below.¹

a. *Law libraries.* Every prison library in Arizona is stocked, at a minimum, with all the books on the "Muecke List."² The "Muecke List" is a list of law books that Judge Muecke, in *Wilkinson v. McDougall*, CIV 81-1397 (D. Ariz. 1984), ruled were constitutionally required to be provided to inmates in the Central Unit law library at the Florence complex. Pet. App. B at 32a-33a.

¹ The attached Appendix "A" summarizes undisputed evidence about the law libraries in the Arizona prison system at the time of trial. The chart presents the number of inmates at each unit, the number of library staff at each library, whether "shelf browsing" is permitted, and whether each law library contains the books from the "Muecke List." The data are taken from the parties' stipulation, J.A. 37-63, Pet. App. B at 19a-41a, and undisputed evidence at trial.

² Referred to by the district court as the "Muecke List." Pet. App. B, at 32a.

The "Muecke List" contains the following materials: United States Code Annotated; Supreme Court Reporter; Federal Reporter (Second) and (Third); Federal Supplements; Shepard's U.S. Citations; Shepard's Federal Citations; Local Rules for the Federal District Court; Modern Federal Practice Digest; Federal Practice Digest (Second); Arizona Code Annotated; Arizona Reports; Shepard's Arizona Citations; Arizona Appeals Reports; Arizona Law of Evidence (Udall); ADC Policy Manual; 108 Institutional Management Proceedings; Federal Practice and Procedures (Wright); Corpus Juris Secundum; and Arizona Digests. Pet. App. B at 32a-33a. Some of the libraries additionally contain self-help litigation manuals, including the 1983 edition of the *Prisoner's Self-Help Litigation Manual*. Several libraries also contain the Pacific Reporter (Second) series. Pet. App. B at 34a.

The library system maintains an interlibrary loan program. Thus, libraries that do not have a particular volume of interest to an inmate may obtain a copy from other prison libraries that have it or from the Arizona State University Law School library. R.T. 1/7/92, p. 98; J.A. 149-150.

b. *Library hours.* Pursuant to departmental policy, all law libraries in the prison system must be open for inmate use at least twelve hours per day, between the hours of 7:00 a.m. and 10:00 p.m., seven days a week. Exhibit 785. Law libraries can obtain exemptions to the law library hour requirement, depending on usage. Most of the law libraries received exemptions because of the actual low usage. J.A. 43-44; Appendix A. For example, on average, only three inmates per week were using the law library at Yuma, so an exemption was issued to shorten the library's hours. R.T. 1/27/92, pp. 33-34; J.A. 212-213. Most of the law libraries are open in excess of forty hours per week. J.A. 38-49; Appendix A. Inmates may request additional law library time whenever needed. J.A. 38-40, 42, 44, 46-48.

c. *Inmate access to the libraries.* General-population inmates may "browse" the bookshelves in most law libraries. Appendix A. In all of the units at the Perryville complex and the Kaibab unit at the Winslow complex, however, inmates must go to the counter and ask a law clerk to retrieve materials. Inmates need not give an exact citation. Instead, they can receive materials by making a general request. R.T. 1/15/92 at 144; J.A. 209. Administrators at the Perryville complex terminated browsing at the unit law libraries after discovering that inmates had vandalized the legal materials. J.A. 148-149; Exhibit 834. The Kaibab library cannot physically accommodate shelf-browsing by inmates due to space limitations. Pet. App. B at 20a.

For high security inmates, physical access is restricted because of safety and security concerns, in keeping with the greater physical restrictions that are required for these inmates. Two types of high security inmates exist. First, the "lockdown" facilities at the Special Management Unit (SMU) and Cellblock 6 (CB-6) in the Florence complex house the most dangerous and violent prisoners in the Arizona prison system. These prisoners are at such "a very high custody level," that two prisoners "can't be in any common area at any time, restrained or unrestrained." R.T. 1/7/92 at 154; J.A. 162. These prisoners are permitted access to the law libraries, but must remain in glass-encased stalls inside the law library when they conduct legal research. Pet. App. B at 20a; *Casey v. Lewis*, 4 F.3d 1516, 1519 (9th Cir. 1993). The separate stalls permit several prisoners to use the library at once, in a manner that preserves security. R.T. 1/7/92 at 154; J.A. 162-163. These prisoners request and receive legal materials from a law clerk or library personnel. R.T. 1/15/92 at 144; J.A. 208-209.

Second, some inmates, for disciplinary or security reasons, are segregated from general-population inmates in lockdown cellblocks within a prison complex. These are

known as Complex Detention Units ("CDUs").³ These inmates are housed in CDUs pending a disciplinary hearing or transfer to a maximum security unit. R.T. 1/27/92 pp. 39-40; J.A. 213-214. At the time of trial, approximately 261 Arizona inmates were segregated in CDUs. R.T. 1/27/92 at 8-20. CDU inmates are denied physical access to the law library for several reasons. For example, two officers must transport a lockdown inmate across a prison yard containing general-population inmates to the library—producing a potentially volatile situation for both inmates and officers. R.T. 1/27/92 at 8-20. Providing two-guard escorts requires additional staffing. Even with the use of escorts, mixing general population inmates with segregated inmates creates a security risk. R.T. 1/27/92 at 39-40; J.A. 213-214.

To provide high security inmates with access to the law library while also avoiding the security and logistical problems of transporting CDU inmates to the libraries, ADOC permits materials to be brought to such inmates. Lockdown inmates who seek legal materials or a legal assistant send a written request to the law library. R.T. 1/27/92 at 39; J.A. 213. The legal materials are then brought to the inmate's lockdown cell, *id.*; Pet. App. B at 21a, generally within twenty-four hours of the request. R.T. 1/15/92 at 107-108; J.A. 195-196. CDU inmates are usually allowed to keep their materials for more than twenty-four hours. *Id.* There is no restriction on the number of books an inmate can request. R.T. 1/7/92 at 86, 112; J.A. 144-145, 156.

d. *Library personnel.* At the time of trial, eight of the twenty-six unit law libraries employed full-time librarians. Appendix A. All of the librarians had either a master's or an undergraduate degree in library science. R.T. 1/7/92, pp. 74, 75, 80, 150, 151, 152; J.A. 137-138, 141, 160-161; R.T. 1/15/92, pp. 94-96, 100, 142;

³ CDUs are located at the Douglas, Perryville, Winslow, Tucson, and Alhambra complexes. R.T. 1/27/92 at 8-20.

J.A. 186-88, 190, 208. The other libraries were managed by correctional service officers. Appendix A. The librarians and correctional service officers in charge of law libraries attended annual, three-day seminars where law library training was conducted by the Director of Library Services. *Id.* Librarians and correctional service officers also attended a nine-week course, which covered topics on constitutional law and post-conviction law. R.T. 1/7/92, pp. 261-262; J.A. 174-175. Librarians also attended other workshops and seminars for training purposes. *Id.* In addition, Petitioners employed at least fifty-five inmate law clerks who provided general library services and specific research assistance to inmates, and maintained the law library collections. J.A. 50-54; Appendix A.

e. *Legal assistance.* All inmates may request assistance from law clerks and legal assistants. Law clerks are inmates who are paid to provide general library research assistance, such as assisting library personnel in locating materials. Law clerks do not assist inmates specifically in preparing pleadings. R.T. 11/22/91 at 152; R.T. 12/17/91 at 257; R.T. 12/19/91 at 120-121; J.A. 66-67, 130-131. An inmate can be both a law clerk and a legal assistant. *Id.*

Legal assistants are unpaid volunteers who assist other inmates by preparing their cases and drafting pleadings. Legal assistants are chosen from inmates who are determined to be capable of assisting other inmates with legal research and writing and whose institutional records indicate the ability to handle the responsibilities of an inmate legal assistant. Exhibit 785. At the time of trial, there were at least ninety volunteer legal assistants throughout the State. J.A. 50-54; Appendix A.

f. *Qualification and training of legal assistants.* In most Arizona prison complexes, inmates apply to the warden to become legal assistants. Pet. App. B at 30a. Two ADOC complexes have developed tests for inmates seeking to become law clerks and legal assistants. *Id.*

With respect to training, the Central Unit in Florence has an extensive training program for legal assistants. The Tucson complex provided an 18.5 hour program for inmate legal assistants in July, 1990. Pet. App. B at 30a-31a. Aside from these programs, ADOC has no mandatory training program for inmates or civilians who provide legal assistance. Pet. App. B at 30a. Paralegal courses are available, however, through correspondence or closed-circuit television. Pet. App. B at 31a; R.T. 1/7/92 at 186-187; J.A. 127. Many law clerks and legal assistants have completed or are currently taking paralegal courses. R.T. 12/17/91 at 253; 12/18/91 at 101; and R.T. 12/19/91 at 113; J.A. 101, 105, 127.

g. *Non-English assistance.* Generally, non-English speaking inmates are assisted by interpreters. ADOC recruits bilingual inmate legal assistants for inmates who do not speak or read English. R.T. 1/15/92, p. 100; J.A. 190; Exhibit 785. Inmates who do not speak English may obtain assistance from bilingual law clerks, legal assistants, staff members or inmate translators. R.T. 12/18/91, p. 106; R.T. 12/19/91, p. 114; R.T. 1/14/92, p. 92; R.T. 1/15/92, p. 100; R.T. 1/27/92, p. 110; J.A. 108-109, 127-128, 182-183, 190.

h. *Access to counsel.* It is ADOC policy that correspondence is the primary means of communication between an inmate and his attorney. R.T. 1/27/92, pp. 40-41; J.A. 214-215. When an inmate has a court deadline or an immediate need to speak to an attorney, a telephone call can be arranged. *Id.* Telephone calls are scheduled as soon as they can be arranged, generally within twenty-four to forty-eight hours after the request. Inmate requests for telephone calls are granted unless the inmate is abusing the system. R.T. 1/14/92, p. 94; J.A. 184-185. Telephone calls are made in a counselor's office on a non-monitored telephone line. R.T. 1/27/92, pp. 40-41; J.A. 214-215. The counselor may remain in the office while

the inmate makes the telephone call, but counselors are instructed not to listen to the calls and will leave the office if requested. R.T. 1/27/92, p. 41; J.A. 214-215; R.T. 1/15/92, p. 137; J.A. 206-207; R.T. 1/14/92, p. 95; J.A. 185.

i. *Photocopying.* Under departmental policy, inmates receive photocopies of court documents and other legal papers within forty-eight hours of their request to duplicate them. Exhibit 785; R.T. 1/7/92, pp. 102-103, 162-164, 265; J.A. 151-152, 165-167, 176-177; R.T. 1/15/92, pp. 108-109; J.A. 195-197. An inmate may receive copies in less time if necessary to meet a legal deadline. *Id.* Inmates may observe while their documents are being photocopied. *Id.* The photocopies are scanned visually to make sure they are legal documents and do not contain contraband. Otherwise, the documents are not read. *Id.*

3. *The Proceedings Below.*

a. *District Court.* Twenty-two Arizona inmates filed this class action pursuant to 42 U.S.C. § 1983 claiming, *inter alia*, that Arizona prison officials unconstitutionally denied them meaningful access to the courts. After a bench trial, the district court ruled in the inmates' favor. Pet. App. B at 48a.⁴ The district court appointed a special master to design a legal access program (Pet. App. E), which the court adopted in its October 13, 1993 permanent injunction order. Pet. App. C at 50a-85a.⁵

⁴ Although this Court has repeatedly criticized lower courts for "their verbatim adoption of findings of fact prepared by prevailing parties," *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 & n.4 (1964), the district court in this case adopted the prisoners' proposed findings in their entirety. Compare Pet. App. B at 19a-41a with R. 362 at 212-233.

⁵ The permanent injunction was taken almost entirely from a previous injunction drafted by the same special master in *Gluth v. Kangas*, 951 F.2d 1504 (9th Cir. 1991). Compare Pet. App. C at 50a-85a with Pet. App. E at 96a-113a.

The minutely-detailed injunction is sweeping in scope and imposes upon the State an array of extraordinary remedies. Despite the absence of *any* specific findings that ADOC policies either resulted in a classwide violation or caused a member of the class to suffer constitutional injury, the district court ordered system-wide relief. The injunction required Petitioners, among other things, to:

- (1) open all ADOC law libraries between fifty and eighty hours per week, including night and weekend hours, regardless of demand (Pet. App. C at 62a);
- (2) allow inmates, regardless of their security status, to determine where and with whom they could sit in the libraries (*id.* at 63a);
- (3) provide fully equipped law libraries at every prison unit with a capacity of 150 inmates (*id.* at 61a);
- (4) hire full-time, professionally trained librarians with law or paralegal degrees for every law library (*id.* at 67a);
- (5) provide a fifty to sixty-hour training course for inmate legal assistants every six months, consisting of a thirty to forty-hour video component and a twenty-hour live component (*id.* at 71a-72a);
- (6) provide a weekly minimum of three twenty-minute telephone calls to an attorney, an attorney representative, or legal organization (*id.* at 76a);
- (7) purchase a complete, up-to-date set of Pacific Reporters and Digests for each law library (*id.* at 69a);
- (8) permit all inmates direct access to library stacks, unless Petitioners can first document an actual security risk (*id.* at 61a);
- (9) provide the special master with the prison's schedules of activities and events, the names of all library employees, and their specific work schedules (*id.* at 63a);

(10) permit inmates to select the times at which they will use the law libraries (*id.* at 63a-65a);

(11) accede to the conditions imposed by the court for the removal of inmates from the libraries, as well as the removal of legal assistants (*id.* at 67a, 71a); and

(12) correct all structural or acoustical problems to reduce noise level in the libraries (*id.* at 68a).

This relief ensures inmates obtain not just reasonable access, but optimal access to the courts—access that far exceeds that available to ordinary residents of the State.

The injunction also creates an ongoing, and essentially permanent, role for the special master in managing the State's prisons.⁶ Among other things, the special master must:

- analyze the library and inmate turnout schedules to assess library attendance and determine whether any alterations are required for adequate access (*id.* at 64a);
- oversee the preparation of, and grant final approval to, an introductory guide to the use of the law libraries in Spanish and English (*id.* at 66a);
- work with ADOC officials to secure qualified applicants for librarian positions (*id.* at 67a);
- approve the hiring of law librarians who have library science degrees, rather than law or paralegal degrees (*id.*);

⁶ In its order appointing the special master, the district court required ADOC officials to deposit at least \$5,000 a month in a bank account maintained for use by the special master and his assistant. Pet. App. E at 94a. This account was reserved solely for the special master's costs, such as travel and office expenses. *Id.* The special master and his assistant billed ADOC an average of approximately \$12,000 per month in fees and costs while monitoring the prison system before this Court issued the stay, even though the injunction was not yet implemented.

- assist in identifying appropriate self-help manuals and forms for the libraries, and approving their use (*id.* at 69a); and
- review the proposed syllabus and schedule, as well as the instructor's experience, for each live offering of instruction to the legal assistants (*id.* at 72a).

In addition, the ADOC must provide to the special master copies of many of the official records and notices that ADOC is required to produce daily in administering the injunction, such as the daily log book pages for the law libraries (*id.* at 63a), the written notices of reasons provided to inmates when they are removed from the library for disruptive behavior (*id.* at 67a), and the written notices provided to inmates when they are denied legal assistant status (*id.* at 70a).

b. *Ninth Circuit.* The Ninth Circuit affirmed the injunction in all relevant respects.⁷ The court held that (1) ADOC violated the right to court access by failing to staff all libraries with trained bilingual legal assistants, Pet. App. A at 8a; *Casey v. Lewis*, 43 F.3d 1261, 1267 (9th Cir. 1994), and (2) the 261 "lockdown" inmates with previous disciplinary or security problems were entitled to physical access, "unless ADOC can demonstrate actual security risks." Pet. App. A at 6a; *Casey, id.* In response to ADOC's argument that the scope of the injunction far exceeded the requirements of the Constitution as set forth in *Bounds v. Smith*, 430 U.S. 817 (1977),

⁷ The court of appeals vacated in part and remanded in part on issues not directly germane to this case. Pet. App. A at 17a-18a. The issues remanded concern the \$46 indigency standard imposed by the district court, the proper copying costs, and the district court's refusal to allow Petitioners any opportunity to object to the fees of the special master. The only portion of the injunction vacated by the Ninth Circuit was the ordered purchase of electric typewriters, which Respondents conceded on appeal were not constitutionally required.

the Ninth Circuit simply held that the district court had "broad" and inherent powers to fashion equitable relief. Pet. App. A at 13a; *Casey*, 43 F.3d at 1270. While acknowledging that the remedy must do no more than correct a specific violation, and that the remedy may not unduly intrude into the administration of the prison system, the Ninth Circuit upheld the remedial measures the district judge ordered. Petitioners applied for and this Court stayed the injunction pending the timely filing of a petition for writ of certiorari. *Lewis v. Casey*, 114 S. Ct. 1638 (1994); Pet. App. D at 86a.

SUMMARY OF ARGUMENT

The district court in this case has arrogated to itself the executive and legislative functions of operating a State's prison operation as it relates to the use of legal resources. The court attempted to micromanage virtually every aspect of the prison library, from when a library must remain open to what access to the shelves is appropriate for prison inmates. This extraordinary remedial decree is unsupported by any systemic violations of the Constitution that could remotely support the breathtaking sweep of the district court's actions.

For two independent reasons, the judgment of the lower courts must be reversed. First, under this Court's decisions interpreting the Due Process and Equal Protection Clauses as they apply to inmates, Respondents have not proven a constitutional violation. Second, even if some constitutional violation had been established, the breadth of the injunction violates this Court's well-established principle that the remedy be no broader than necessary to cure the violation.

1. Although the text of the United States Constitution does not identify an inmate's "right of access" to the courts, this Court has held that the Due Process and Equal Protection Clauses prohibit the imposition of arbitrary barriers to inmates' access. State regulation of inmates'

access to the courts is not, however, subject to heightened scrutiny. Inmates are not a "suspect" class, and access to law libraries and legal assistants is not a fundamental right. Under *Turner v. Safley*, 482 U.S. 78 (1987), rational basis review is the proper standard for assessing prison regulations that allegedly infringe inmates' access rights.

Prior to *Bounds v. Smith*, 430 U.S. 817 (1977), this Court held that the Constitution precludes the States from imposing unique burdens on inmates' ability to engage in litigation simply because of their status. See, e.g., *Johnson v. Avery*, 393 U.S. 483, 490 (1969); *Ex Parte Hull*, 312 U.S. 546, 549 (1941). In *Bounds*, the Court held, consistent with its prior decisions, that the States must also provide inmates with basic supplies and access to legal materials, not otherwise available because of their confinement, so that inmates can present their claims in court. The inquiry is whether a particular resource is necessary to give inmates a "reasonably adequate opportunity" to present their claims. This Court did not intend to require "optimal access." Nor did it command that inmates must have access to any particular type of library or form of legal assistance.

The Court also recognized that what is "reasonably adequate" must be evaluated in light of the liberal "notice" pleading standard that is used to evaluate papers filed by *pro se* litigants. *Haines v. Kerner*, 404 U.S. 519, 5204 (1972). Because courts are obligated to apply the law liberally in such matters and can appoint counsel to represent inmates who may have valid claims, the requirements for access are quite minimal.

Finally, the States' obligation to provide access should be interpreted in light of the special need for judicial deference to decisionmaking by prison officials. *Turner*, 482 U.S. at 84-85. Principles of federalism and separation of powers counsel judicial restraint absent the clearest proof of systemic constitutional violations.

2. To establish a violation of their constitutional rights, Respondents must demonstrate that Arizona's policies either impose arbitrary and irrational barriers to access or that the State fails to provide the minimal materials and resources that are necessary to overcome the inherent limitations of confinement. Neither showing has been made in this case. Accordingly, no constitutional violation has been demonstrated.

As an initial matter, the lower courts fundamentally misanalyzed the liability issue by concluding that there was a constitutional violation despite the fact that Respondents failed to prove that they suffered any cognizable constitutional injury, such as the inability to raise a claim or meet a filing deadline, as a result of Arizona's policies. Moreover, the State's policies do not impose any arbitrary barriers to access and clearly satisfy the minimal affirmative obligation to provide resources necessary to provide reasonably adequate access. *Bounds* requires "adequate law libraries or adequate assistance from persons trained in the law," but not both. All of Arizona's prisoners have such access. First, all of Arizona's prison libraries already contain the extensive "Muecke List" law books—and some contain more extensive collections—and certainly meet the minimum standard of *Bounds*.

Illiterate or non-English speaking inmates not only have physical access to these well-stocked libraries, but also have help from legal assistants. This access, which places these inmates in at least the same position as their civilian counterparts, satisfies constitutional requirements.

Finally, segregated high-risk inmates have adequate access to law books via the paging system, and they have additional access to inmate law clerks and legal assistants. Arizona's restrictions on their physical access to the library are reasonably related to the State's legitimate penological interests.

Because no constitutional violation occurred here, the lower courts overstepped their Article III authority in ordering the State to implement a system-wide program of penal reform.

3. Even if some aspect of Arizona's legal access program is constitutionally inadequate, the exhaustive system-wide remedy is grossly overbroad. As the Court made plain last Term in *Missouri v. Jenkins*, 115 S.Ct. 2038 (1995), a federal court's remedy must relate to the original violation and must do no more than correct that specific violation. Here, the injunction does not relate to any identified constitutional defect. Rather, it imposes a sweeping system-wide remedy, with no findings of a system-wide violation.

Moreover, an examination of the individual components of the injunction reveals that all of them are overbroad, and not adequately supported by any finding of a constitutional violation. For example, the injunction's requirement that lockdown prisoners be permitted direct access to the stacks is not supported by any finding that inmates have suffered a constitutional injury from the current policy, and ignores the State's legitimate penological objective of preventing situations that present the risk of violence. The remaining components of the district court's order suffer from the same fundamental flaws and must be overturned.

ARGUMENT

I. THE CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS REQUIRES ONLY THAT STATES PROVIDE INMATES A "REASONABLY ADEQUATE OPPORTUNITY" TO PRESENT THEIR CLAIMS.

Rather than determining if Arizona's legal access program met the constitutional minimum of reasonably adequate access, the lower courts erroneously examined whether the program provided inmates with *optimal* access to legal materials and assistance. Thus, the lower courts' entire approach was fundamentally flawed.

The Fourteenth Amendment principles underlying inmates' right of access, and this Court's decisions construing that right, require only that States (1) not impose arbitrary barriers to inmate court access, and (2) provide the minimal materials and resources necessary for inmates to have a "reasonably adequate opportunity" to present a constitutional claim in court. Both the negative and the affirmative components of this so-called "right of access" involve only a minimal intrusion upon the States' wide discretion reasonably to regulate and control their prison facilities. Arizona's access program clearly meets this constitutional minimum.

A. Under the Equal Protection and Due Process Clauses, State Regulation of Inmates' Access to the Courts Is Not Subject to Heightened Scrutiny.

The United States Constitution contains no textual guarantee of a "right of access" to the courts, either for inmates or for anyone else. Nevertheless, this Court has held that the Constitution prohibits the imposition of arbitrary barriers to inmates' access to the courts, either as an element of equal protection, *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987), or as an element of due process, *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled on other grounds*, *Thornburgh v.*

Abbott, 490 U.S. 401 (1989). See *Murray v. Giarratano*, 492 U.S. 1, 11 n.6 (1989).

1. The Equal Protection Clause of the Fourteenth Amendment prohibits classifications that are based upon impermissible criteria or that interfere with the exercise of fundamental rights. When a challenged classification does not involve a suspect class and does not implicate a fundamental right, the appropriate standard of review by a court is rational basis scrutiny. *City of Dallas v. Stanglin*, 490 U.S. 19, 23 (1989). Under rational basis review, state action implicating a particular group of persons, such as inmates, is permissible as long as it bears "some rational relationship to a legitimate state purpose." *Id.* (quoting *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973)).

The rational basis standard applies to equal protection analysis of prison programs relating to court access. Inmates are not a "suspect" class for which courts must apply a heightened standard of scrutiny when evaluating equal protection claims and this Court has not included inmate access to law libraries or legal assistants in the limited category of fundamental rights to which heightened scrutiny applies.⁸ Therefore, state action impairing inmates' ability to present claims (based solely upon their status as inmates) violates the Equal Protection Clause only if that state action is not rationally related to a legitimate state interest in running the prison efficiently or effectively. *Johnson v. Avery*, 393 U.S. 483 (1969).

⁸ While the *Bounds* Court, in passing, did refer to "the fundamental constitutional right of access to the courts," 430 U.S. at 828, the Court did not indicate that it intended to include access to libraries or legal assistants in the limited category of constitutional rights to which heightened scrutiny applies. This Court has never used strict scrutiny to analyze prison regulations relating to court access, either in *Bounds* or in any other case. To the contrary, the Court made clear in *Turner v. Safley*, 482 U.S. 78, 89 (1987), that heightened scrutiny does not even apply to prison regulations that burden concededly fundamental rights of inmates.

But any restriction placed upon inmates (as opposed to non-inmates), or upon high risk inmates (as opposed to general population inmates), that rationally serves a legitimate government interest is unquestionably permissible under the Equal Protection Clause. Accordingly, to the extent that inmate "access to courts" claims implicate equal protection rights, the task for the courts is merely to determine whether the prison policy bears some rational relationship to unquestionably legitimate penal objectives.

2. The Due Process Clause of the Fourteenth Amendment prohibits the States from depriving individuals of liberty or property without due process of law. The substantive legal claims of the class in this case, that the inmates are seeking "access" to vindicate, generally implicate either liberty interests (i.e., habeas corpus claims) or property interests (i.e., constitutional claims for injunctive relief or damages). Thus, inmates are entitled to due process of law before these rights are impaired.

This case, however, does not involve inmates' rights to counsel in a criminal trial or appeal as of right. In such circumstances, all individuals, including prison inmates, are entitled to counsel pursuant to the Sixth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (trial); *Douglas v. California*, 372 U.S. 353 (1963) (appeal). Instead, this case involves only rights of "access" limited to post-conviction claims, such as federal habeas corpus, and civil rights claims. *Bounds*, 430 U.S. at 828 n.17 (court's "main concern here is 'protecting the ability of an inmate to prepare a petition or complaint'") (citing *Wolff v. McDonnell*, 418 U.S. 539, 586 (1974)).

The Due Process Clause does not require the State to provide counsel to inmates who pursue discretionary appeals and post-conviction remedies. *Murray v. Giarratano*, 492 U.S. 1 (1989) (neither the Eighth Amendment nor the Due Process Clause requires States to appoint counsel

for indigent death row inmates seeking state post-conviction relief); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (state post-conviction relief); *Ross v. Moffitt*, 417 U.S. 600, 616 (1974) (discretionary appeals).⁹ Nor has this Court ever recognized a right to counsel for inmates who bring civil claims.¹⁰

The issue in this case involves the States' due process obligations to inmates, including those without counsel, who are seeking access to the courts to pursue civil rights claims and post-conviction remedies. As set forth more fully below, state action that impairs inmates' ability to present their claims to a court will pass muster under the Due Process Clause if it does not arbitrarily impede access and, subject to legitimate penological restrictions, provides the materials and resources necessary to overcome the barriers to access inherent in the fact of incarceration.

3. *Turner v. Safley*, 482 U.S. 78 (1987), makes clear that rational basis scrutiny is the proper standard of review for a prison regulation that allegedly infringes inmates' constitutional rights. *Id.* at 89 ("when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests"). This standard is "necessary if 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional oper-

⁹ Arizona exceeds constitutional requirements by affirmatively providing counsel to indigents in state court post-conviction proceedings. *Murray*, 492 U.S. at 12 n.7; Rule 32.4(c), Arizona Rules of Criminal Procedure. Thus, the court access sought by unrepresented inmates in Arizona's prison system is largely for the purpose of filing federal habeas corpus petitions and civil rights actions.

¹⁰ Fee-shifting statutes like 42 U.S.C. § 1988, however, provide an economic incentive to attract counsel to meritorious civil rights cases. Such cases that do not attract counsel are probably too risky or "too unlikely to succeed." See *City of Burlington v. Dague*, 112 S.Ct. 2638, 2642 (1992); *Kay v. Ehrler*, 499 U.S. 432, 436 (1991).

ations.'" *Id.* (quoting *Jones v. North Carolina Prisoners Union, Inc.*, 433 U.S. 119, 128 (1977)).

Turner identifies four factors that determine whether a prison policy that infringes on inmates' constitutional rights is reasonable: (1) whether there is a valid, rational connection between the prison policy and the legitimate governmental interest put forward to justify it; (2) whether the inmates have alternative means of exercising their constitutional right; (3) the impact that accommodation of the constitutional right will have on guards, other inmates, and the allocation of prison resources; and (4) whether the absence of ready alternatives is evidence of the reasonableness of the prison regulation. 482 U.S. at 89-90. With respect to the last factor, the Court emphasized that "[t]his is not a 'least restrictive alternative' test." *Id.* at 90; see also *id.* at 89 (heightened scrutiny would distort the decisionmaking process because "every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand"). Rather, "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.* at 90.

B. Prison Policies and Practices Violate the Equal Protection and Due Process Clauses If They Impose Arbitrary Barriers to Inmates' Access to the Courts.

This Court's pre-*Bounds* cases focused on and invalidated state regulations that created hurdles, either in the form of special requirements or special limitations, for inmates seeking court access, hurdles that do not exist for non-inmates who wish to bring lawsuits. *Wolff v. McDonnell*, 418 U.S. 539 (1974) (Nebraska prison regulation prohibiting legal assistance from inmates other than the warden-designated inmate "legal advisor" violates right

of access); *Johnson v. Avery*, 393 U.S. 483, 490 (1969) (striking down Tennessee prison policy that prevented inmates from assisting other inmates in preparing "Writs or other legal matters"); *Ex parte Hull*, 312 U.S. 546, 549 (1941) (invalidating Michigan prison regulation allowing prison officials to confiscate inmate's petition for habeas corpus). While, unquestionably, the very nature of their confinement causes inmates certain obstacles to conducting litigation, these cases stand for the unremarkable proposition that due process prevents States from imposing additional arbitrary burdens on inmates' ability to engage in litigation.

In *Bounds v. Smith*, 430 U.S. 817 (1977), this Court held that the Constitution not only prohibits regulations that actively and arbitrarily interfere with inmates' access to the courts, but that States must provide basic supplies and access to legal materials—that are not otherwise available because of the condition of confinement—so that inmates can present their claims to the courts. This issue of an "affirmative duty" arises because inmates who are not represented by counsel may lack the basic resources necessary to present their claims; not only pens and paper, but also the ability to secure rudimentary legal knowledge and advice.

The Court held in *Bounds* that States have an obligation to "assist inmates in the preparation and filing of meaningful legal papers by providing inmates with adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. at 828 (emphasis added). The Court also made clear that "indigent inmates must be provided at state expense with paper and pen to draft legal documents with notarial services to authenticate them, and with stamps to mail them." *Id.* at 824-25. Finally, the Court referred to its prior decisions holding that States must provide transcripts and waive filing fees for indigent inmates, just as they do for other indigent

citizens. *Id.* at 822 (citing *Smith v. Bennett*, 365 U.S. 708 (1961) (State may not require indigent inmate to pay a filing fee before docketing his application for a writ of habeas corpus); *Burns v. Ohio*, 360 U.S. 252 (1959) (State may not require indigent criminal defendant to pay a filing fee before seeking leave to appeal); and *Griffin v. Illinois*, 351 U.S. 12 (1956) (State must provide indigent criminal defendant with copy of trial transcript)).

In particular, the Court stated that the inquiry is "whether law libraries or other forms of legal assistance are needed to give inmates a *reasonably adequate opportunity* to present claimed violations of fundamental constitutional rights to the courts." *Bounds*, 430 U.S. at 825 (emphasis added). The "reasonable adequacy" standard had been used in the prison setting in this Court's prior decision in *Johnson*, 393 U.S. at 489 (State may not deprive "those unable themselves, with *reasonable adequacy*, to prepare their petitions" of legal assistance) (emphasis added); and in *Bounds*, 430 U.S. at 823, 824, 830 (State must provide inmates with "meaningful access" to the courts).

To determine the boundaries of a State's duty to permit "reasonably adequate" access, it is clear that—contrary to the holdings below—this Court did not intend to require *optimal* access, that is, the best access possible in the prison setting. Had the Court intended to ensure that inmate litigation be optimized, the Court simply would have mandated the appointment of counsel.¹¹ Instead, the Court's focus in *Bounds* was on ensuring that inmates have an opportunity—roughly equivalent to the

¹¹ Indeed, even inmates who have a Sixth Amendment right to counsel are entitled only to "effective" counsel, not "optimal" counsel. See *Lockhart v. Fretwell*, 113 S. Ct. 838 (1993); *Burger v. Kemp*, 483 U.S. 776, 794 (1987) ("in considering claims of ineffective assistance of counsel, we address not what is prudent or appropriate, but only what is constitutionally compelled") (internal quotation omitted); *Strickland v. Washington*, 466 U.S. 668 (1984).

opportunity available to similarly situated non-inmates—to present claims that are available to them and to file papers that are sufficient for the courts to evaluate. *Id.* at 825 (inquiry is whether inmates have “a reasonably adequate opportunity to present claimed violations”); *id.* at 828 (right of access is designed to ensure that inmate can file “meaningful legal papers”). A State that provides either law libraries¹² or legal assistance has provided inmates with a reasonable opportunity to understand whether they have claims and, if so, to set forth the necessary facts in a form that will permit courts to evaluate the inmates’ complaints.

Moreover, the constitutional duty imposed upon the States is an obligation to ensure that inmates have access to the courts, rather than access to any particular type of library or form of legal assistance. *Id.* (“[A] legal access program need not include any particular element we have discussed, and we encourage local experimentation”). Prison libraries and legal assistants are a means to an end—that is, the provision of “reasonably adequate” access to the courts under existing notice pleading standards—not an end in themselves.

2. Inmates engaged in *pro se* litigation—unlike members of the bar—need only identify the general nature of their claims and the alleged facts supporting them. Pursuant to this Court’s decision in *Haines v. Kerner*, 404 U.S. 519, 520 (1972), all federal circuits and many state courts evaluate *pro se* pleadings under “less stringent standards.”¹³ See also *Estelle v. Gamble*, 429 U.S. 97,

¹² *Id.* at 830 (“adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts”).

¹³ See, e.g., *Strickler v. Waters*, 989 F.2d 1375, 1386-87 (4th Cir.), *cert. denied*, 114 S. Ct. 393 (1993); *Ruark v. Solano*, 928 F.2d 947, 949 (10th Cir. 1991); *Crooks v. Nix*, 872 F.2d 800, 801 (8th Cir. 1989); *Gobel v. Maricopa County*, 867 F.2d 1201, 1203 (9th Cir. 1989); *Childs v. Pellegrin*, 822 F.2d 1382, 1385 (6th

106 (1976). Generally, a pleading will be dismissed for failure to state a claim only if it appears “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Haines*, 404 U.S. at 521 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In practice, courts often go to extraordinary lengths to avoid dismissing potentially meritorious claims, liberally allowing inmates to amend their pleadings and even instructing them on how to do so.¹⁴ When courts suspect that the inmate has a valid claim, they can appoint counsel to represent inmates, pursuant to 28 U.S.C. § 1915(d) (1994) for civil rights claims and 18 U.S.C. § 3006A(g) (1994) for federal habeas corpus petitions.¹⁵

Cir. 1987); *Simmons v. Dickhaut*, 804 F.2d 182, 184 (1st Cir. 1986); *Moore v. Florida*, 703 F.2d 516, 520 (11th Cir. 1983); *Robles v. Coughlin*, 725 F.2d 12, 15 (2d Cir. 1983); *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Cir. 1982); *Weaver v. Wilcox*, 650 F.2d 22, 26 (3d Cir. 1981); *Woodall v. Foti*, 648 F.2d 268, 271 (5th Cir. 1981); *Hudson v. Hardy*, 412 F.2d 1091, 1094 (D.C. Cir. 1968); *Breck v. Ulmer*, 745 P.2d 66, 75 (Alaska 1987), *cert. denied*, 485 U.S. 1023 (1988); *Findlay v. Lewis*, 831 P.2d 830, 837 (Ariz. App. 1991), *rev’d on other grounds*, 837 P.2d 145 (Ariz. 1992); *Apodaca v. Ommen*, 807 P.2d 939, 943 (Wyo. 1991); *Lo Sacco v. Young*, 564 A.2d 610, 612, 613 (Conn. App. 1989); *Blair v. Maynard*, 324 S.E.2d 391, 396 (W.Va. 1984); *Tedder v. Fairman*, 418 N.E.2d 91, 97 (Ill. App. 1981), *aff’d in part, rev’d in part*, 441 N.E.2d 311 (Ill. 1982).

¹⁴ See, e.g., *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (giving civil rights litigants an opportunity to amend complaints while simultaneously advising them of potential meritorious theories of recovery); *Gordon v. Leeke*, 574 F.2d 1147, 1152-53 (4th Cir.), *cert. denied*, 439 U.S. 970 (1978).

¹⁵ For federal habeas corpus petitions, 18 U.S.C. § 3006A(g) (1994) authorizes federal courts to appoint counsel if “the interests of justice so require.” Counsel must be appointed for any habeas petitioner granted an evidentiary hearing. Rule 8(c), 28 U.S.C. foll. § 2254 (1994); *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984); *Swazo v. Wyoming Dep’t*

Under the "notice pleading" system, courts apply the law liberally, regardless of whether inmates have cited appropriate legal authorities, presented legal analyses, or correctly identified their claims.¹⁶ Inmates primarily need to present the facts underlying their claims, for which they can rely on their personal knowledge. The facts do not even need to be presented completely or precisely, as courts liberally grant leave to amend or appoint counsel when presented with ambiguous factual allegations that suggest a meritorious claim. Thus, the goal of inmate access requirements is not to "improve" inmate pleadings pursuant to some objective standard of quality. Instead, the goal is to ensure that inmates have the basic resources necessary to file minimally adequate

of Corrections State Penitentiary Warden, 23 F.2d 332, 333 (10th Cir. 1994).

Courts use varying standards for appointing counsel for indigents in civil cases under 28 U.S.C. § 1915(d) (1994). See e.g., *Hahn v. McLey*, 737 F.2d 771, 774 (8th Cir. 1984) (per curiam) (appointment upon request if colorable claim presented); *Hodge v. Police Officers*, 802 F.2d 58, 60-61 (2d Cir. 1986) (multiple factor test, with threshold requirement that the indigent's position seems likely to be of substance). Even courts requiring a showing of "exceptional circumstances" allow the appointment of counsel where there is a likelihood of success on the merits and complex claims are at issue that the plaintiff has a limited ability to articulate. *Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir. 1990).

¹⁶ See American Bar Association, Judicial Administration Division, Standards Relating to Trial Courts, § 2.23 at 38-39, Conduct of Cases Where Litigants Appear Without Counsel (1992 ed.) ("[I]t is ultimately the judge's responsibility to see that the merits of a controversy are resolved fairly and justly. Fulfilling that responsibility may require that the court, while remaining neutral in consideration of the merits, assume more than a merely passive role in assuring that the merits are adequately presented. . . . Where litigants represent themselves, the court in the interest of fair determination of the merits should ask such questions and suggest the production of such evidence as may be necessary to supplement or clarify the litigants' presentation of the case").

pleadings that can be measured against the "notice pleading" standards.¹⁷

3. Finally, claims of inmate "access" to the courts should be weighed in light of the special need for judicial restraint in the area of prison decisionmaking. Such restraint rests upon this Court's acknowledgement of the greater expertise of prison officials concerning issues of penal management. See *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989) (courts should defer to prison administrators in resolving the day-to-day problems in managing a prison, which lie within the expertise of prison officials). Because of the volatility and danger inherent in prisons, the risks of substituting courts for wardens and other administrators are unacceptable. Thus, only the clearest showings of constitutional injury can justify judicial intervention.

Judicial deference to the judgment of prison administrators stems not only from the judiciary's limited competence in penal management, but also from the doctrine of separation of powers. As this Court stated in *Bell v. Wolfish*, 441 U.S. 520, 548 (1979) (citing *Procunier*, 416 U.S. at 405):

[J]udicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.

Similar concerns were reiterated by the Court in *Turner v. Safley*, 482 U.S. at 84-85 (1987):

¹⁷ Reasonably adequate access "can be satisfied in various ways." *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J. and O'Connor, J. concurring in judgment). The manner in which *Bounds* is implemented, of course, is left to State legislatures and prison administrators who "must be given 'wide discretion' to select appropriate solutions." *Id.*

Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.¹⁸

In addition to separation of powers concerns, federalism concerns are implicated in this case. As this Court repeatedly has noted in the school desegregation context, State institutions and facilities should be run by State and local officials. See, e.g., *Missouri v. Jenkins*, 115 S. Ct. 2038, 2054 (1995); *Freeman v. Pitts*, 503 U.S. 467, 489 (1992); *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955). That principle applies with at least equal force when the federal courts attempt to manage the operations of State penal facilities. Thus, fundamental principles of federalism, as well as separation of powers, dictate that *Bounds*' limited requirement of access to the courts not become a license for comprehensive federal judicial supervision of State corrections facilities.

* * * *

In sum, due process and equal protection considerations impose two categories of limitations on State policies and practices affecting inmate access to the courts. First, a State may not impose arbitrary obstacles to inmates' ability to prepare and present claims to the courts. Second, a State must take reasonable steps, to the extent they are consistent with any legitimate penological interest, to eliminate barriers to court access that are inherent in the

¹⁸ Justice O'Connor, in a concurring opinion, recently affirmed that "[b]eyond the requirements of *Bounds*, the matter is one of legislative choice based on difficult policy considerations and the allocation of scarce legal resources." *Murray*, 492 U.S. at 13 (O'Connor, J., concurring).

fact of incarceration. This latter obligation simply means that, subject to limitations based upon security or other legitimate concerns, an inmate's ability to gain access to the courts from within the prison setting should be approximately the same as his ability to do so outside of the prison setting. As *Bounds* makes clear, access to basic materials and resources, either libraries or legal assistance, generally satisfies the State's obligation.

As long as a State complies with these limited and specific constitutional obligations, it should be the prerogative of State legislators and administrators to decide whether State funds should be spent on trying to improve the quality of inmate pleadings, as opposed to hiring additional prison guards or improving prison educational or recreational facilities—or, for that matter, increasing State spending on schools, parks or roads, or reducing taxes.

II. THIS CASE PRESENTS NO CONSTITUTIONAL VIOLATION BECAUSE ARIZONA'S PRISON POLICIES AND PRACTICES DO NOT IMPOSE ANY ARBITRARY BARRIERS TO ACCESS AND CLEARLY SATISFY THE STATE'S MINIMAL AFFIRMATIVE OBLIGATION TO PROVIDE MATERIALS AND RESOURCES NECESSARY TO PROVIDE "REASONABLY ADEQUATE ACCESS."

To establish a class-wide violation of their right of access, Respondents must show that Arizona's policies either impose arbitrary and irrational barriers to access for a significant portion of the class, or that the State fails to provide those minimal materials and resources that are necessary to overcome the inherent limitations of confinement. Neither showing was made in this case. The record clearly establishes that the State meets, and in significant respects exceeds, the minimum requirements set forth in *Bounds*. Accordingly, no class-wide violation has been demonstrated.

The courts below made two fundamental errors in concluding that there was a constitutional violation: (1) they ignored the elementary principle that plaintiffs attempting to establish a violation of Section 1983 must demonstrate both a constitutional injury and causation before they are entitled to relief; and (2) they measured Arizona's policies against an erroneous legal standard that far exceeds the minimal constitutional requirements.

A. Respondents Failed to Demonstrate That Any ADOC Policy Violated Their Access Rights by Causing a Cognizable Injury.

The lower courts erred by imposing liability on Petitioners without proof as to all of the essential elements of a claim of a constitutional violation, including both actual injury and causation. As this Court has noted, "[t]he plain words of [Section 1983] impose liability—whether in the form of payment of redressive damages or being placed under an injunction—only for conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of rights secured by the Constitution and the laws." *Rizzo v. Goode*, 423 U.S. 364, 370-71 (1976). See also Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* 123 (2d ed. 1986) (Section 1983 "requires that a defendant's conduct be a cause in fact of plaintiff's constitutional deprivation.").

Most federal courts require inmates asserting "access to court" claims to demonstrate that some identifiable prison policy or resource deficiency caused them actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim. See *Strickler v. Waters*, 989 F.2d 1375, 1383 n.10 (4th Cir.), cert. denied, 114 S. Ct. 393 (1993) (citing cases).¹⁹ The district court in this case applied

¹⁹ See, e.g., *Crawford-El v. Britton*, 951 F.2d 1314, 1322 (D.C. Cir. 1991), cert. denied, 113 S. Ct. 62 (1992) (deprivation must

the Ninth Circuit's two-tiered approach,²⁰ which imposes no actual injury requirement when the complaint involves a "core" *Bounds* issue (such as inadequate law libraries or legal assistance), but requires a constitutional injury to be demonstrated in complaints involving other access issues. Pet. App. B at 41a, citing *Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989).²¹

The purpose of the injury and causation requirements is to determine whether the prison policy complained of, such as the library hours, "actually deprived the prisoner of access to the courts." *Vandelft v. Moses*, 31 F.3d 794, 797 (9th Cir. 1994), petition for cert. filed (U.S. Apr. 12, 1995) (No. 94-8879). Since the constitutional right at issue is to court access—rather than to libraries or legal assistants, *per se*—the right is violated only when prison policies result in *actual* denial of court access. *Id.* In the absence of this requirement, inmates could seek and obtain relief—as in this case—based on generalized complaints about their law library or legal assistance program, even when the alleged "deficiencies" have not resulted in any

be linked to an "adverse litigation effect"); *Shango v. Jurich*, 965 F.2d 289, 292 (7th Cir. 1992) (complainant must show "some quantum of detriment caused by the challenged conduct of state officials resulting in the interruption and/or delay of plaintiff's pending or contemplated litigation" (emphasis in original)); *Tuyman v. Crisp*, 584 F.2d 352, 357 (10th Cir. 1978) (injury requirement not satisfied where complainant failed to allege "that any of his multitudinous filings have been stricken as untimely or that any of his cases have been dismissed or otherwise prejudiced" by having to file for extensions of time).

²⁰ The Ninth Circuit affirmed the injunction without addressing Petitioners' argument that the district court erred in granting relief without finding actual injury. See Pet. 8 n.6.

²¹ This approach has not been followed consistently in the Ninth Circuit. See *Johnson v. Moore*, 948 F.2d 517, 521 (9th Cir. 1991) (imposing actual injury requirement in case involving allegations of library inadequacy).

deprivation of a constitutional right. *See Rizzo*, 423 U.S. at 370-71.

The Ninth Circuit's approach also leaves courts without a judicially manageable standard for determining whether constitutional requirements are satisfied. Courts are well-equipped to hear and decide questions of causation and injury based on past events. They are ill-equipped, however, to decide questions such as how many books should go in a library, how many hours the library should remain open, what access inmates should have to the stacks, or how legal assistants and librarians should be trained. Such questions of policy are legislative and administrative, rather than judicial, in nature. When these questions are left to the courts, judges may implement their own visions and ideals for State prisons, thereby usurping legislative and executive functions in violation of the principle of separation of powers and, in this case, federalism as well.

Here, there were no constitutional violations established based upon the application of any State policies. The district court made no findings that *any* ADOC policy or practice caused any inmate to suffer actual injury, such as the inability to prepare a pleading or to meet a filing deadline.²² Yet, despite the absence of this essential element of a Section 1983 violation, the district court ordered comprehensive system-wide relief. In effect, the district court ordered relief based upon the perceived possibility that future deprivations *might* occur, a possibility that

²² The district court did find one instance in which an illiterate inmate had his claim dismissed with prejudice and one instance in which an illiterate inmate was unable to file a legal action. Pet. App. B at 26a; 884 F. Supp. at 1558. Arizona has met its constitutional obligations with respect to illiterate and non-English speaking prisoners. *See infra* at 35. Accordingly, any lack of access experienced by these two inmates is not attributable to unconstitutional State policies and does not constitute constitutionally cognizable injury.

exists in any prison system regardless of the scope and extent of the resources it makes available. Possible harm, however, provides no justification for federal judicial intervention. In the absence of an injury of constitutional magnitude, there simply is no basis on which to sustain the finding of liability, and the judgment below should be reversed in its entirety.²³

B. No Violation Has Been Demonstrated Because ADOC's Policies Impose No Arbitrary Barriers and Meet the Minimal Affirmative Obligation to Provide Resources Necessary to Provide Reasonably Adequate Access.

Arizona does not impose any arbitrary barriers to access for inmates incarcerated in its prisons, and Respondents effectively concede as much. Thus, the only issue is whether the State has provided the minimal resources that are necessary to provide reasonably adequate access. The record establishes that the State meets, and in several respects exceeds, its affirmative obligation to provide basic legal resources and supplies. Accordingly, because Arizona's programs comply on their face with Fourteenth Amendment requirements and there are no findings of actual injury resulting from these programs, no system-wide violation has been demonstrated.

Most circuits have correctly interpreted *Bounds* to mean what it says and require only "adequate law libraries or adequate assistance from persons trained in the law," but not both. *See Campbell v. Miller*, 787 F.2d 217, 229-30

²³ Although the lack of a showing of injury means that Respondents are not entitled to any relief, the State does not contend that the Respondents lacked standing to raise these claims in the first instance. Respondents clearly met the threshold of an actual case or controversy pursuant to Article III of the United States Constitution. They simply failed to prove the existence of a constitutional violation, including causation of injury, that would entitle them to relief under Section 1983.

(7th Cir.), *cert. denied*, 479 U.S. 1019 (1986); *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 855 (9th Cir. 1985); *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985); *Hooks v. Wainwright*, 775 F.2d 1433, 1435 (11th Cir. 1985) ("*Bounds* refers to law libraries or other forms of legal assistance, in the disjunctive, no fewer than five times" (emphasis in original)), *cert. denied*, 479 U.S. 913 (1986); and *Cepulonis v. Fair*, 732 F.2d 1, 6 (1st Cir. 1984). Perhaps the clearest indication that *Bounds* requires either law libraries or legal assistants is the portion of this Court's opinion approving the district court's approach to devising a remedy for the constitutional violation:

[The district court] did not thereupon thrust itself into prison administration. Rather, it ordered [prison officials] themselves to devise a remedy for the violation, strongly suggesting that it would prefer a plan providing trained legal advisors. [Prison officials] chose to establish law libraries, however, and their plan was approved with only minimal changes over the strong objection of [inmates]. Prison administrators thus exercised wide discretion within the bounds of constitutional requirements of this case.

Bounds, 430 U.S. at 832-33.

Arizona's prison libraries are unquestionably adequate under any concept of "reasonably adequate" access. Stocked with at least the extensive "Muecke List" of books, the prison law libraries are arguably better equipped than many law firm libraries in Arizona. Whatever the constitutional minimum for legal materials, Arizona certainly meets and exceeds it, without the additional requirements imposed by the injunction. The State, however, does not merely satisfy *Bounds*' disjunctive requirements; it in fact surpasses them by providing both comprehensive law libraries and legal assistance to inmates. These two resources ensure that inmates have a reasonably adequate opportunity to satisfy the notice pleading requirements.

Illiterate and non-English speaking inmates have physical access to excellent libraries, *plus* help from legal assistants and law clerks. This access fulfills the specific "libraries or assistance" holding of *Bounds*. Nothing in *Bounds* suggests—as the Ninth Circuit here assumed—that States are constitutionally obligated to furnish trained, bilingual legal assistance to inmates who have access to more than adequate law libraries.

Petitioners recognize that non-English speaking and illiterate inmates face special problems in obtaining court access, even when they have access to libraries and legal assistants. While this is unfortunate, it is also true of non-English speaking and illiterate citizens who are not in prison. Non-incarcerated individuals with these limitations must do the best they can with their limited English skills, and with the help of others. If they cannot find help, their rights might go unvindicated. *Bounds* merely requires that States not make illiterate and non-English speaking individuals *worse* off by virtue of their incarceration. In this case, there has been no finding that inmates in Arizona are worse off than non-incarcerated citizens.

The result of the lower court's broad interpretation of *Bounds* is that convicted criminals sentenced to prison enjoy far greater legal resources in pursuing civil actions than law-abiding citizens. This Court should overturn this expansion of *Bounds*. A State like Arizona that provides both law libraries with collections such as those provided to Arizona inmates, and legal assistants who are familiar with the types of claims that inmates are likely to raise, has provided inmates with a "reasonably adequate" and "meaningful" opportunity to present their habeas and civil rights claims to a court. Given a court's duty to liberally construe *pro se* pleadings and analyze an inmate's factual allegations in light of the applicable law, the resources Arizona provides assure that inmates can file pleadings that courts can fully and fairly evaluate.

Finally, the State's restrictions on library access for the 261 lockdown inmates do not violate those inmates' right of access because they clearly bear a rational relationship to legitimate State penological interests under *Turner*. See *supra* at p. 20. Because there were no findings that any of these inmates suffered actual injury as a result of these restrictions, no remedy should issue.

This Court should overturn the dramatic expansion of *Bounds* from a decision requiring the minimal resources necessary to permit an inmate to present a claim to a court into a license for a federal court to micromanage prison operations and facilities. *Bounds* established the foundation for what is necessary to ensure inmates' access to the courts. If a State provides either adequate law libraries or legal assistants who are familiar with the types of claims that inmates are likely to raise, then the State has provided inmates with a "reasonably adequate" or "meaningful" opportunity to present their claims to a court. No more is constitutionally required.

III. ASSUMING ARGUENDO THAT SOME CONSTITUTIONAL VIOLATION WAS ESTABLISHED IN THIS CASE, THE REMEDY ORDERED BY THE DISTRICT COURT FAR EXCEEDS THE PROPER SCOPE OF ANY CONSTITUTIONALLY APPROPRIATE REMEDY.

The district court's injunction is a minutely detailed plan for running the Arizona prison system, establishing requirements for every conceivable aspect of court access, from the number of envelopes and sheets of paper that each inmate must be provided per week (Pet. App. C at 79a), to the price that may be charged for photocopies (*id.* at 77a). The injunction reads like a regulatory code and is, for all practical purposes, just that—a permanent set of judicially-imposed guidelines, pursuant to which the special master would administer a significant segment of the Arizona prison system for the foreseeable future.

By imposing this injunction, the courts below have granted the special master control over a significant portion of the Arizona Legislature's spending power.

The precise bases for the various components of the district court's remedial decree is unclear. For example, the court does not hold that the actual hours of operation of the libraries or the precise educational backgrounds of librarians independently violate the Constitution. Accordingly, the components of the decree do not directly remedy any specific constitutional wrong. If there is a basis for imposing some relief, these components cannot be justified as a proper exercise of remedial discretion given the very limited nature of any constitutional violation that is supported by the record in this case.

Thus, if the record supports some findings that one or two inmates suffered constitutional injury as a result of ADOC's "access" policies and practices, the injunction imposed upon ADOC in this case must be reversed in its entirety because of the failure of the courts below to tailor the injunction to remedy any particularized constitutional violations. In light of the State's compliance with the Constitution's requirements for inmate access to the courts, no basis exists to support the far-reaching injunctive remedy imposed by the courts below. Moreover, an examination of the individual components of the injunction—and the absence of any constitutional support for those components—warrants reversal of the judgment below.

A. The Injunction Must Be Reversed in Its Entirety Because It Is Not Narrowly Tailored.

The expansive district court injunction violates the fundamental principle that equitable remedies must be narrowly tailored to address specific constitutional violations. See *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("the scope of injunctive relief is dictated by the extent of

the violation established"); *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) ("*Milliken I*") ("a federal remedial power may be exercised 'only on the basis of a constitutional violation' and, '[a]s with any equity case, the nature of the violation determines the scope of the remedy'") (quoting *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 16 (1971)); *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) ("*Milliken II*") ("federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation").

Just last Term, in *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995), this Court reversed a district court injunction in a school desegregation case because the injunction exceeded the court's remedial authority to address specific constitutional violations. The purpose of the remedy was inter-district, to attract non-minority students from outside the school district, whereas the constitutional violation was intra-district. The Court chastised the lower court's pursuit of "desegregative attractiveness" as the "hook on which to hang numerous policy choices about improving the quality of education in general within the [school district]." 115 S. Ct. at 2054 (internal quotation omitted). See also *Dayton Bd. of Education v. Brinkman*, 433 U.S. 406, 417 (1977) (instead of tailoring injunctive remedy commensurate with specific constitutional violations, court improperly imposed system-wide remedy); *Keyes v. School Dist. No. 1, Denver, Colorado*, 413 U.S. 189, 213 (1973) (only if there has been a system-wide impact may there be a system-wide remedy).

The district court's injunction in this case, like the order in *Jenkins*, exceeds the court's remedial authority and intrudes on Arizona's legislative and executive prerogatives. The injunction is not limited to curing any demonstrated constitutional violation. It is, instead, simply a "wish list" that embodies the district court's goals

for penal reform. Like the lower courts in *Jenkins*, the courts here have used the inmates' generalized claims of lack of access as a "hook on which to hang numerous policy choices about improving" their lot in general. See *Jenkins*, 115 S. Ct. at 2054.²⁴

In sum, even if Respondents could point to some ADOC policies or practices that have, in particular circumstances, led to an actual impairment of an inmate's right of access to the courts, the injunction issued by the courts below far exceeds any measure of the remedial power necessary to remedy such violations. By imposing their expansive vision of "appropriate" prison access requirements, in the absence of any hint of comparably expansive violations, the courts below have overstepped their constitutional authority. Accordingly, the judgment below must be reversed.

B. The Individual Components of the Remedy Are Not Supported by Any Finding of Violation and Are Overbroad.

Even if the gross overbreadth of the injunction did not mandate its reversal in its entirety, the particular components of the injunction, examined in isolation, also are overbroad and not adequately supported by any finding of a constitutional violation. Each of the particular commands of the injunction, from library contents to access to counsel, is completely unsupported by any particularized finding of constitutional injury necessary to support the relief sought. Accordingly, the judgment below should be reversed.

1. *Library contents and staffing.* Arizona's prison libraries are adequate under any concept of "reasonably

²⁴ The injunction in this case actually is far more problematic than the one in *Jenkins*. While the existence of an underlying and system-wide constitutional violation was undisputed in *Jenkins*, in this case there is no constitutional violation that justifies the exercise of federal remedial power. See Section II.

adequate" and "meaningful" access. *See, supra*, at 3-9. The district court even observed that "the facilities appear to have complete libraries." Pet. App. B at 33a, 46a.

Despite this observation, the district court concluded that self-help manuals and Pacific Digests and Reporters are "necessary for the inmates to pursue their cases," Pet. App. at 46a, 69a. But regional reporters certainly are not constitutionally required; the law library collection approved in *Bounds* did not contain them. *See Bounds*, 430 U.S. at 819 n.4; *see also Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 856 (9th Cir. 1985) (Pacific Reporter not required). Nor is it clear how regional reporters could be "necessary" to Arizona inmates, given that the prison libraries contain the Arizona Reports.²⁵ In essence, the district court ordered this additional set of books because it thought them desirable, thereby equating what is *desirable* with what is *constitutionally required*.

The district court also erred in requiring Arizona to hire full-time, professionally trained librarians with law, paralegal, or library science degrees for every library. Pet. App. C at 67a. In so ruling, the court exercised its injunctive authority, not upon a showing of constitutional need, but on a judicial "guess" about what resources might improve inmates' litigation opportunities. There is no finding, and no evidence in the record to support a finding, that Arizona's current library staff is constitutionally inadequate or that inmates have been denied court access because the librarians were underqualified. Accordingly, the district court exceeded its authority in requiring the State to expend funds to recruit and hire

²⁵ Contrary to Respondents' position in the Ninth Circuit, it is not Arizona's obligation to provide regional reporters for out-of-state prisoners incarcerated in Arizona who desire out-of-state legal materials; that is, if anything, the sending State's obligation. *Boyd v. Wood*, 82 F.3d 820, 821 (9th Cir. 1995).

individuals with advanced degrees to serve as law librarians.

2. *Library hours.* Arizona's existing policy with respect to library hours is reasonable. It is predicated on the rationale that actual use should dictate the hours of operation. Indeed, there is no finding, and no evidence in the record to support a finding, that inmates have been denied court access because of inadequate library hours. Accordingly, the additional requirements imposed by the injunction constitute improper judicial micromanagement.

3. *Library access.* Arizona provides inmates liberal access to libraries, permitting them direct access to the stacks in most facilities. *See supra* at 5-6. The 261 high-risk inmates who have been placed in lockdown facilities for disciplinary or other violations are excepted. Nevertheless, they still have access to library materials through a paging, or book-retrieval, system as well as access to legal assistants. Prison officials adopted the paging system because: (1) forbidding lockdown inmates from mixing with general population inmates in law libraries is necessary to ensure inmate safety and prevent the exchange of contraband; and (2) transporting lockdown inmates, who must remain in restraints and be accompanied by two-guard escorts, from their cells to the law library would mispend limited State resources and create a logistical nightmare. *See supra* at 6.

The district court concluded that the paging system was inadequate and ordered ADOC to provide "prisoners in all housing areas and custody levels" with "regular and comparable visits to the law library," unless the inmate had a "documented inability to use the law library without creating a threat to safety or security." Pet. App. B at 61a. In affirming this requirement, the Ninth Circuit emphasized that "legal research often requires browsing through various materials in search of inspiration." Pet. App. A at 7a, 43 F.3d at 1267 (quoting *Toussaint v.*

McCarthy, 801 F.2d 1080, 1109 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987)).

As an initial matter, the district court's implicit conclusion that prisons are constitutionally compelled to allow inmates to "browse" the shelves of law libraries cannot be sustained. Many public and private libraries, including the Library of Congress, do not allow patrons to have access to the stacks. See *DeMallory v. Cullen*, 855 F.2d 442, 451 (7th Cir. 1988) (Easterbrook, J., dissenting). Since ordinary citizens must abide by the "paging" systems used in such libraries, greater access for inmates cannot be constitutionally required under *Bounds*.

Moreover, the injunction relies on a purely fictional view of legal research as conducted by attorneys, much less as conducted by inmates. Law libraries primarily contain case reporters, which are virtually useless unless one knows—in advance—the citation sought. The notion that anyone could conduct meaningful research by wandering aimlessly down the aisles of a law library "in search of inspiration" is misplaced. The odds of stumbling onto dispositive opinions while thumbing through hundreds of volumes of 1500-page reporters are extremely remote.

In any event, ADOC's reasons for denying lockdown prisoners physical access to the libraries are reasonably related to its legitimate penological interests under all four of the factors that this Court identified in *Turner*. First, there is clearly a rational connection between the prison policy and the prison's interests in preserving security, avoiding logistical problems and allocating resources efficiently. The purpose of placing high-risk inmates in "lockdown" facilities is to segregate them from other inmates and to increase their level of confinement. Once inmates have been "locked down," it is clearly rational to have a paging system by which books are brought to them rather than allowing inmates to go to the prison library.

Second, the paging system provides an "alternative means" for inmates to exercise their right of access. Segregated inmates may request law books through ADOC staff, inmate legal assistants, or inmate law clerks. Books are then retrieved for the lockdown inmate according to the inmate's request, whether it be general or specific.²⁶

Third, forcing ADOC officials to allow segregated inmates physical access to the library would unquestionably impose an undue burden on guards, other inmates, and the allocation of prison resources. Prison officials need not accommodate a constitutional right at the expense of "significantly less liberty and safety for everyone else, guards and prisoners alike." *Turner*, 482 U.S. at 92. Rather, courts are encouraged to defer to the informed discretion of corrections officials. *Id.* at 90. Requiring ADOC to transport high-risk inmates to the library under escort, where those inmates could pose a security risk to general-population inmates, forces ADOC to devote its resources to library research excursions that can, and should, be satisfied through other avenues reasonably chosen by prison officials.

²⁶ Testimony from three lockdown inmates conflicted with that of ADOC staff as to whether inmates are required to provide exact citations for the books they request and how many books they are permitted to keep in their cells. Pet. App. B at 22a. Even accepting the inmates' testimony, however, the problems experienced by only three inmates would justify at most a narrow injunction requiring ADOC officials to retrieve law books for lockdown inmates when the request is of a general nature. The testimony of three inmates concerning their personal accounts of uncooperative staff members did not warrant the district court's conclusion that there existed a systemic, widespread practice within the State. That the extensive legal assistant training program presumably was built upon the episodic experience of these three inmates similarly displays little deference to prison officials or respect for the principle that the injunction must be narrowly tailored to cure the specific constitutional violation.

Turner's fourth factor—whether there are “ready alternatives” such that the chosen regulation is an “exaggerated response” to prison concerns—similarly supports the reasonableness of the policy. This factor requires prison officials to show only that their rejection of a less restrictive alternative was based on “reasonably founded fears that it will lead to greater harm.” *Thornburgh*, 490 U.S. at 419. ADOC's use of a paging system for lockdown inmates certainly is not an “exaggerated response” to prison officials' legitimate penological interests in safety and the economical use of prison resources. Prison officials made the reasonable administrative judgment, to which the district court should have deferred, that less restrictive policies for lockdown inmates posed a legitimate threat of greater harm in the volatile prison setting.

The only exception to physical access permitted by the courts below—where ADOC officials have documented a particular inmate's “inability to use the law library without creating a threat to safety or security”—interferes with the prison officials' wide discretion to anticipate and avoid harm before it occurs. *See Thornburgh*, 490 U.S. at 417 (upholding prison regulations designed to avoid situations that “although not necessarily ‘likely’ to lead to violence, [were] determined by the warden to create an intolerable risk of disorder”). Both *Thornburgh*, 490 U.S. at 418, and *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987), reject the notion that prison officials must wait for actual harm to occur before taking action. Furthermore, the inmates in this case cannot satisfy their burden of pointing to an alternative that accommodates their rights at *de minimis* costs to security interests. *Turner*, 482 U.S. at 91.

4. *Legal assistance.* In all ADOC prison facilities, volunteer inmate legal assistants are available to assist other inmates in preparing their pleadings. In addition to the formal legal assistant training program in the Central

Unit in Florence, and the program for inmate legal assistants conducted at the Tucson complex in July 1990, many legal assistants have completed or are currently taking paralegal courses. Pet. App. B at 31a; R.T. 1/7/92 at 186-187.

For two reasons, the lower courts erred when ordering ADOC to implement the legal assistant training program. First, the Constitution does not require States to do anything more than remove the barriers to court access that imprisonment erected. *Hooks v. Wainwright*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 479 U.S. 913 (1986). Here, the barriers to court access erected by imprisonment were removed by making the law libraries available to all inmates. That certain ADOC inmates are illiterate or do not speak English does not place them on any different footing than that occupied by persons who are not convicted felons. Moreover, even the case relied on by the district court, *Cruz v. Hauck*, 627 F.2d 710 (5th Cir. 1980), stated that “[l]ibrary-use assistance [by writ writers] might solve the problem presented.” *Id.* at 721.

Second, Respondents failed to offer evidence that any inmate was prevented from exercising his right of access to the courts by virtue of insufficiently trained legal assistants. Therefore, the injunction's requirement that Petitioners hire lawyers, paralegals or law students to teach a thirty to forty-hour training course at each law library every six months *ad infinitum*, is clearly improper.

5. *Functionally illiterate inmates.* Illiterate and non-English speaking inmates have access to Arizona's fully stocked prison libraries, *plus* help from legal assistants. This fulfills constitutional requirements because these inmates are *better* off than their non-incarcerated counterparts. Accordingly, the injunction's requirement that Arizona furnish trained, bilingual legal assistants to all inmates is yet another attempt to achieve optimal access, rather than “reasonably adequate” access.

6. *Access to counsel.* ADOC's policy states that most communications between inmates and their attorneys should be by written correspondence or in-person visits. Attorney-client telephone calls are administratively burdensome because inmates must be taken out of their cells to use a limited number of phones. Accordingly, inmates must request permission to make phone calls to their attorneys and must provide a reason why written correspondence or a visit will not suffice.

The injunction requires that each and every inmate, regardless of custody status or need, be allowed "a weekly *minimum* of three twenty-minute calls to (1) an attorney, (2) a designated attorney representative, or (3) a legal organization." Pet. App. C at 76a (emphasis added). ADOC must purchase a sufficient number of phones so that these calls can be made during regular business hours. *Id.*

This burdensome requirement is unjustified. The district court did not find that ADOC's current policy denies inmates reasonable contact with existing or potential attorneys, much less that any inmate has suffered an actual injury to his due process or equal protection rights. Accordingly, the district court had no authority to grant any relief. Even if there were some basis for relief, however, the mandatory minimum of three phone calls per inmate per week is not a narrowly tailored remedy. This blanket policy allows phone calls on demand for all inmates, even when they have no pending deadline—or even any pending litigation—and in circumstances in which communication by letter or in-person is available and appropriate.

Affirmance of this judicially-imposed policy will create a huge administrative burden, particularly with respect to lockdown inmates, who must be transported to and from their cells with a two-guard escort. Because there was no showing that the current practice failed to meet con-

stitutional requirements, this aspect of the injunction is another improper attempt to ensure optimal access.

7. *Photocopying.* The district court erroneously concluded that ADOC needed a policy to assure that legal documents to be photocopied were not read by other inmates or staff. Pet. App. B at 47a. The injunction requires that Petitioners post a bulletin in the law libraries warning staff members not to read legal materials being copied. Pet. App. C at 77a. In addition, the injunction goes so far as to set forth the amount per page Petitioners can charge inmates for copies.

The injunction was ordered despite the fact that ADOC already had in place a policy prohibiting library staff from reading legal materials. In addition, Respondents presented evidence from only *one* inmate that prison staff had supposedly read legal materials. Most importantly, Respondents never contended that the manner in which legal materials were photocopied deprived any inmate of his right of access to the court. Therefore, the lower courts clearly erred in finding a constitutional violation as a result of this policy.

* * * *

Operating a prison system is the business of State officials. State administrators have wide discretion to run their prisons so long as they do not run afoul of the minimal requirements imposed by the Constitution. State administrators are precluded from imposing arbitrary barriers to an inmate's exercise of the right to file papers in court or to allow the fact of imprisonment to serve as an obstacle to filing a judicial claim that would not be faced by an ordinary citizen. But these are limited restrictions on the State, and the findings and record cannot justify the extraordinary and system-wide remedy imposed by the district court here, which ignores the State's legitimate penological interests, violates core federalism values, and undermines separation of powers principles. In a mis-

guided effort to "optimize" each inmate's ability to litigate against the State, the district court has arrogated to itself the authority to exercise the State legislature's spending power. But the "dream" that animated the district court to play executive official, unless reversed, will be the State's "nightmare" in attempting to balance prison security, legitimate cost concerns and the minute commands of a federal court. Not only does the Fourteenth Amendment not require this distortion of institutional roles, but Article III affirmatively condemns it.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

LEWIS v. CASEY

	No. of Inmates	"Muecke List" Books	Library Hours	Shelf Browsing Permitted	Legal Ass'ts Law Clerks Correc. Sec. Off.
ASPC-FLORENCE					
Women's Division	190	X*	M-F 8A-3:30P; T-W 10A-6P; Th 8A-3P (38 hours/week)	Yes	1-C.S.O.; 2-L.C. 5-L.A.
South Unit	409	X	T-Sat 7A-3P (40 hours/week)	No	9-L.A.; 3-L.C. 1-C.S.O.
Cellblock Six (CB-6)	180	X*	M-Su 7A-10P (105 hours/week)	No	3-L.A.; 4-L.C.** 1-C.S.O.
North Unit	391	X*	M-F 8A-3:30P; T-Th 10:30a-6:30P (31 hours/week)	Yes	1-L.A.; 2-L.C.** 1-C.S.O.
Picacho Work Camp use North -- see above	203				
East Unit	430	X*	M-F 10A-6P (Closed 3-4 for Count) (35 hours/week)	Yes	7-L.A.; 2-L.C. 1-C.S.O.
Rynning	800	X	M-F 7A-8:15P (66 hours/week)	Yes	5-L.C.; 11-L.A. 2-C.S.O.
Special Management Unit (SMU)	90 I-3's 822 I-5's	X*	(I-3's) T-SA 6P-8P (I-5's) M 7A-3P, T-F 7A-9P Sa 1P-9P (82 hours/week)	No	11-L.A.; 3-L.C. 1-C.S.O.
ASPC-PHOENIX					
Alhambra Reception Center	192	X*	M-F 7:30A-8:30P; Sa Sun 8A-10P (93 hours/week)	No	2-L.A.; 2-L.C.
Flamenco Mental Health Unit use Alhambra -- see above	48				
Aspen DWI Center use Alhambra -- see above	248				
Arizona Center for Women (ACW)	350	X*	M-F 1P-9P (40 hours/week)	Yes	2-L.C.
Globe	120	X		Yes	
ASPC-DOUGLAS					
Gila Unit	632	X*	M-F 12P-3:30P, 5P-9P Sat Sun 8A-10:30A, 12:30P-3:30P (48.5 hours/week)	Yes	3-L.C. 1-Librarian
Maricopa use Gila -- see above	129				
Mohave Unit	872	X*	M-F 1P-3:30P and 5P-9P; Sa Sun 8A-10:30A, 12:30P-3:30P (43.5 hours/week)	Yes	2-L.A.; 3-L.C.** 1-Librarian
Papago DWI use Mohave -- see above	208				
Cochise Complex Detention Unit use Mohave -- see above	66				

	No. of Inmates	"Muecke List" Books	Library Hours	Shelf Browsing Permitted	Legal Ass'ts Law Clerks Correc.Sec.Off.
ASPC-PERRYVILLE					
Santa Cruz Unit	744	X*	M-Th:1P-9P; F:8A-4P (40 hours/week)	No	2-L.C.; 1-C.S.O.**
CDU use Santa Cruz -- see above	40				
San Juan Unit	744	X*	M-Th:1P-9P; F:8A-4P (40 hours/week)	No	3-L.C.; 1-C.S.O. 1-Librarian
San Pedro	432	X*	M-F:7A-11A.; 2P-4P,6P-8P (same hours on Sat and Sun) (if officer available) (40 hours/week)	No	2-L.A.; 3-L.C. 1-C.S.O.
Santa Maria Unit	302	X*	M-F:8A-8P (60 hours/week)	No	2-L.A.; 3-L.C.** 1-C.S.O.
ASPC-TUCSON					
Cimarron Unit	748	X***	61 hours/week	Yes	13-L.A.; 2-L.C.
Echo	249	X***	76 hours/week	Yes	1-L.A.; 1-L.C. 1-Librarian
Rincon	662	X***	80 hours/week	Yes	5-L.A.; 5-L.C. 1-Librarian
Santa Rita	660	X***	M-Sa:8:30A-3P; T,Th:5P-6:30P (42 hours/week)	Yes	7-L.A.; 1-Librarian
CDU use Santa Rita -- see above	71				
ASPC-WINSLOW					
Coronado	600	X*	M,T,W,F: 1P-4P and 4:30-9P; Th:1P-3:30P and 6:30P-9P; Sat:9A-11A (37hours/week)	No	4-L.A.**; 2-L.C. 1-Librarian
Kaibab	716	X*	M-F:7A-9P (60 hours/week)	No	5-L.A.; 3-L.C.** 1-Librarian
CDU use Kaibab -- see above	36				
ASPC-SAFFORD	476				
Graham		X		Yes	
Tonto		X		Yes	
ASPC-YUMA	243	X		Yes	
ASPC-FORT GRANT	632	X		Yes	

* Law libraries which exceed volumes contained on the Muecke List.
 ** Spanish speaking law library personnel available.
 *** Respondents admitted to the sufficiency of the law library collections at all ASPC Tucson units.

No. 94-1571

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CLERK

In The
Supreme Court of the United States

October Term, 1993

SAMUEL LEWIS, et al.,

Petitioners,

vs.

FLETCHER CASEY, JR., et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the district court's order correctly applies the constitutional requirements set forth in *Bounds v. Smith*, 430 U.S. 817 (1977).

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STATEMENT OF THE CASE

The statement of the case in the brief of petitioners (hereinafter defendants) does not accurately reflect the record. Many of their allegations are contrary to the facts found by the district court¹ and are not supported, or only partially supported, by citations to the record.² For this reason, respondents (hereinafter plaintiffs) set forth their own statement of the case. Due to space limitations, plaintiffs do not respond to every inaccuracy in defendants' brief, but discuss only those that are most material to the issues to be decided by this Court.

On January 12, 1990, twenty-two prisoners filed this class action lawsuit, pursuant to 42 U.S.C. § 1983, challenging the policies and practices of the Arizona Department of Corrections³ (hereinafter ADOC) with regard to access to the courts, among other matters. Following a three-month bench trial, the district court found that several policies of the ADOC violated the prisoners' right to meaningful access to the courts. *Casey v. Lewis*, 834 F. Supp. 1553 (D. Ariz. 1993), App. B to Petition for Writ of Certiorari (hereinafter Pet. App. B). The court found that two groups of prisoners in particular were denied meaningful access to the courts: those who are illiterate or non-English speaking and therefore unable to use a law library on their own, and those without direct access to law library books.

¹ The defendants' challenge to the district court's factual findings was rejected by the court of appeals. See *Casey v. Lewis*, 43 F.3d 1261, 1266-1270 (9th Cir. 1994), App. A to Petition for Writ of Certiorari at 4a-13a (adopting findings of the district court). The defendants do not argue before this Court that these factual findings were clearly erroneous.

² This defect is due, in part, to the fact that defendants have attached an appendix (Appendix A) to their brief that lacks specific citations to the record, but which they nonetheless cite in support of many allegations. See Respondents' Motion to Strike Appendix A to Brief of the Petitioners (Sept. 1, 1995) (pending).

³ The Arizona prison system consists of nine complexes, each of which is subdivided into several housing units. On January 22, 1992, the system housed a total of 14,424 men and 922 women. R.T. 1/27/92 at 11-12.

A. Illiterate Prisoners

The district court found that illiterate and non-English speaking prisoners are unable to research the law without assistance. Pet. App. B at 25a. The uncontradicted evidence at trial was that prisoners reading at an eighth grade or lower level cannot adequately use a law library without assistance. R.T. 11/22/91 at 198; J.A. 260.⁴ The district court also found that as a result of their inability to receive adequate legal assistance, illiterate prisoners have had their cases dismissed with prejudice and have been unable to file legal actions. Pet. App. B at 25a. Many prisoners fall into these categories. Testing of incoming prisoners in 1990-1991 revealed that 17.2% had a reading level below sixth grade and 14.5% were non-English speaking. In 1989, a system-wide study of prisoners within the ADOC established that 35% of the adult incarcerated population had a reading level of seventh grade or below. Pet. App. B at 25a.

B. Prisoners Without Direct Access to a Law Library

In most facilities, prisoners in lockdown status⁵ have no

⁴ In this brief, plaintiffs use the term "illiterate" to refer to all prisoners whose lack of proficiency in reading and writing English makes them unable to use a law library on their own. This usage is intended to refer to those prisoners found by the district court to be unable to use a law library without assistance. Pet. App. B at 25a, 43a. This usage tracks that of the Court in *Johnson v. Avery*, 393 U.S. 483, 487 (1969), where the Court referred to the category of prisoners who are in need of legal assistance as the "illiterate or poorly educated." The case law regarding "illiterate" prisoners would apply equally to non-English speaking prisoners because, by definition, they lack literacy in the language of the law library's contents.

⁵ The defendants claim that approximately 261 prisoners were in lockdown status at the time of trial. Pets.' Brief at 6 (citing R.T. 1/27/92 at 8-20). The record citation does not support the claim. According to the cited testimony, the total capacity of the lockdown units for five prison complexes is 306; the testimony is silent on whether the other four complexes have lockdown units. The district court also included in the definition of lockdown facilities the (continued...)

physical access to the law library. They must rely on a "paging system" that allows them to request legal materials from the law library. This system results in "severe interference with their access to courts." Pet. App. B at 21a. Contrary to defendants' assertions, the number of books that can be requested,⁶ and the length of time books can be kept,⁷ are restricted. Pet. App. B at 24a. Also contrary to defendants' assertions, the district court found that such prisoners are often denied law books unless they can provide an exact citation,⁸ and that they routinely experience long delays in receiving requested legal materials or legal

⁵(...continued)

approximately eleven hundred prisoners housed at two units in the Florence complex, Cellblock 6 (CB-6) and the Special Management Unit (SMU). See Pet. App. B at 20a, and R.T. 1/27/92 at 17-18.

⁶ The defendants cite two portions of the record for the claim that lockdown prisoners are not limited in the number of books they can receive. Pets.' Brief at 6 (citing R.T. 1/7/92 at 86, 112; J.A. 144-145, 156). The first citation provides no support for the claim. The second citation to testimony of the Perryville librarian supports the claim, but only for the Perryville complex. The district court, however, made a contrary finding about the Perryville complex's practice based on the librarian's deposition and exhibits showing her actual handling of book requests. See Pet. App. B at 24a n.30.

⁷ The only citation for the defendants' claim that lockdown prisoners can generally keep books for more than twenty-four hours is the testimony of a librarian from the Tucson complex. Pets.' Brief at 6 (citing R.T. 1/15/92 at 107-108; J.A. at 195-196). The testimony cited does not support this claim. Indeed, the witness says the opposite: lockdown prisoners usually are limited to keeping the materials overnight. R.T. 1/15/92 at 109; J.A. at 197.

⁸ Pet. App. B at 22a. The defendants cite one witness' testimony for their claim, which is contrary to the findings of the district court, that prisoners are not required to give an exact citation. Pets.' Brief at 5 (citing R.T. 1/15/92 at 144; J.A. at 209). The testimony was from the librarian at ASPC-Winslow who said that prisoners did "[n]ot necessarily" have to give an exact citation to get requested materials. The district court's finding of a practice to the contrary was based on substantial evidence. See Pet. App. B at 22a n.22. Indeed, the forms given to prisoners indicate that prisoners "must be specific" about case citations. See Exs. 40 and 249 bd.

assistance.⁹ Some prisoners in lockdown status are denied even this privilege, leaving them without any access to legal materials. The district court found that "[e]ven lockdown prisoners who are intelligent, literate, and legally trained are unable to do legal research under [a] paging system that allows only one or two books at a time every couple of days." Pet. App. B at 24a.

The same problems exist for other groups of prisoners who are allowed to go to the law library but not to gain direct access to the books themselves. General population prisoners at half of the facilities for which there is record evidence have no direct access to the books themselves. See Pet. App. B at 20a and Stipulation, J.A. 38-42.¹⁰ The prisoners at two lockdown facilities are required to conduct their legal work in cages in the law libraries, and thus also lack direct access to the books. Pet. App. B at 20a.

These prisoners must request legal materials from untrained prisoner law clerks or security officers. Pet. App. B at 19a-20a. Some of the law libraries did not have complete lists of their contents, and not all of the law libraries with inventories posted the list.¹¹ Thus, prisoners without direct access did not even have an adequate basis on which to request books.

⁹ Pet. App. B at 22a-23a. The defendants claim that legal materials are generally delivered within twenty-four hours of the request, citing one witness. Pets.' Brief at 6 (citing R.T. 1/15/92 at 107-108; J.A. at 195-196). The cited testimony, which involves Santa Rita, a unit at the Tucson facility, in fact indicates that on Tuesday and Thursday, a request will take a day. On the other days, the request will take two or three days. R.T. at 107-108, 116-117. Indeed, the district court found that, in some institutions, it can take "several days, even weeks" for lockdown prisoners to receive requested materials. Pet. App. B at 22a-23a.

¹⁰ Thus, the defendants' claim that "[g]eneral-population inmates may 'browse' the bookshelves in most law libraries," for which they cite only Appendix A (Pets.' Brief at 5), is not supported by the record.

¹¹ Stipulation, J.A. at 37, 41-43, 46-49. (North, South, Alhambra, San Juan, and Santa Maria did not have an inventory posted at time of pretrial stipulation; Arizona Center for Women did not have complete inventory posted.)

C. Sources of Assistance for Illiterate Prisoners and Prisoners Without Direct Access to a Law Library

The district court found that most of the law libraries are staffed by only security staff and prisoner law clerks. See Pet. App. B at 26a-27a. The Women's Division at ASPC-Florence and Alhambra have no civilian staff assigned to the law library. Stipulation, J.A. at 51-52. Law clerks and staff are restricted to providing prisoners with requested materials; contrary to defendants' assertion, prisoner law clerks do not provide research assistance to their fellow prisoners. Pet. App. B at 28a.¹² Where there is civilian staff, such staff do not perform research or assist in drafting legal documents. *Id.*¹³

For illiterate prisoners and prisoners without direct access to law books, the ADOC's sole provision for research and drafting assistance consists of untrained prisoner legal assistants.¹⁴ *Id.* However, with regard to prisoners in lockdown status, legal assistants can help only those prisoners with a disciplinary charge or a criminal charge pending. Pet. App. B at 22a. Thus, with this exception, prisoners in lockdown status have no access to law books other than through the paging system described above, and are provided no assistance from a legal assistant or anyone with legal training.

¹² For their claim that the law clerks provide specific research assistance, the defendants cite Appendix A, which lacks any specific citations to the record, and the parties' pretrial stipulation, J.A. at 50-54. Pets.' Brief at 7. The citation to the pretrial stipulation contains nothing supporting the defendants' claim.

¹³ The defendants' claims regarding the training of staff are consistently exaggerated. For example, they claim that at the time of trial the ADOC employed eight librarians, all of whom had a degree in library science. Pets.' Brief at 6. In fact, the portions of the record cited by defendants support a claim for six librarians, four of whom have a degree in library science.

¹⁴ Law clerks can assist their fellow prisoners only by giving them requested material from the law library stacks. In contrast, legal assistants can help other prisoners perform legal research and draft pleadings and letters to the court. Pet. App. B at 28a.

The district court found that there was an insufficient number of legal assistants available to assist prisoners who need legal assistance. Pet. App. B at 28a.¹⁵ Moreover, the legal assistants frequently are not sufficiently skilled to provide prisoners with meaningful assistance. Pet. App. B at 30a. Prisoner legal assistants are not required to have any legal training and, in most facilities, the ADOC does not provide them with training.¹⁶ Pet. App. B at 30a-31a. For a brief period of time, the ADOC promulgated a policy requiring that legal assistants meet competency standards and complete a legal research course, but the ADOC rescinded that policy. See Pet. App. B at 31a.¹⁷

The district court also found that the ADOC did not ensure the availability of Spanish-speaking legal assistants or law clerks, and that in many facilities there are none. Pet. App. B at 29a.¹⁸

¹⁵ The defendants claim that at the time of trial "there were at least ninety volunteer legal assistants throughout the State." Pets.' Brief at 7 (citing J.A. 50-54 and Appendix A). Appendix A, as noted, does not contain citations to the record. The Joint Appendix citation is to the pretrial stipulation, which notes fifty-one legal assistants, and some additional assistants (the number is not specified) at Mohave. The district court opinion makes findings showing sixty-five legal assistants. Pet. App. B at 26a-28a. The ADOC similarly exaggerates the number of prisoner law clerks. Compare the defendants' brief at 7 (claiming "at least fifty-five" law clerks) with the pretrial stipulation, J.A. 50-54 (39 law clerks) and the district court's finding of fact, Pet. App. B at 26a-28a (47 law clerks).

¹⁶ The defendants state that two complexes have developed tests for prisoners seeking to become law clerks and legal assistants. Pets.' Brief at 7 (citing Pet. App. B at 30a). The district court's finding, and the portions of the record cited by the court in support of the finding, refer to tests for law clerks only. Moreover, the district court's finding refers only to the Perryville complex and one unit of the Tucson complex. There are four general units and a detention unit in the Tucson complex. R.T. 1/27/92 at 16.

¹⁷ The defendants cite the rescinded policy as the sole support for the claim that legal assistants are chosen from prisoners who are determined to be capable of assisting other prisoners with legal research and writing. Pets.' Brief at 7 (citing Ex. 785). See Ex. 308 (showing rescission of portion of Ex. 785 requiring that legal assistants be competent).

¹⁸ The defendants give no record citation in support of their claim that non-English speaking prisoners are generally assisted by interpreters. Pets.' (continued...)

D. Other Deficiencies

The district court also found deficiencies in the contents of the law libraries (Pet. App. B at 32a-34a),¹⁹ and in various other policies and practices, such as the lack of confidentiality in attorney-client telephone calls²⁰ and the photocopying of legal

¹⁹(...continued)

Brief at 8. The defendants also claim that prisoners who do not speak English may obtain assistance from law clerks, legal assistants, staff members, or prisoner translators. *Id.* (citing various portions of record). The citations given in support of this claim in fact indicate that there were significant problems in finding appropriate Spanish translators.

¹⁹ The defendants claim, without citation to the record, that all the prison law libraries contained a standardized list of law books. Pets.' Brief at 3. The district court found, to the contrary, that the law libraries at Alhambra, CB-6, Santa Maria, the Arizona Center for Women, and Rynning were incomplete. Pet. App. B at 33a. In the court of appeals, the defendants conceded that these five law libraries were incomplete. Appellants' Opening Brief, April 4, 1994, at 5 n.5.

The defendants also claim that the library system maintains an interlibrary loan program so that libraries missing a particular volume may obtain it from another prison law library or the Arizona State University Law School Library. Pets.' Brief at 4 (citing R.T. 1/7/92, p. 98; J.A. 149-150). The citation is to the testimony of the librarian at ASPC-Perryville, to the effect that, if a particular volume of the Pacific Second Regional Reporter were missing, she would contact the Arizona State University library. There is no evidence that the prison system as a whole has a general practice of obtaining books from the University, or any interlibrary loan policy. In fact, the exhibits at trial showed a number of instances in which the Perryville librarian simply rejected prisoners' requests for books or other legal materials if they were not in the law library. See, e.g., Exs. 249 jz, 249 kf, 249 jr.

²⁰ The defendants claim that requests for calls to attorneys are granted unless the prisoner is "abusing the system." Pets.' Brief at 8. In contrast, the district court found that, in order to obtain a telephone call, a prisoner must show a need that cannot be met by mail, and prisoners are so advised. Pet. App. B at 37a-38a. Moreover, the district court found that, if prisoners do not have a pending case, or an attorney of record, they are unable to place a telephone call to a prospective attorney. Pet. App. B at 38a.

Defendants also claim that telephone calls are made in a counselor's office on a non-monitored telephone line, but counselors "are instructed not to (continued...)

documents.²¹ See Pet. App. B at 35a-41a.

E. The Remedial Stage

The district court appointed a special master to work with the parties to develop a remedy for these violations. Over the course of several months, the special master held five meetings with defendants, received five sets of comments and objections from them, and, with their cooperation, developed the proposed remedy submitted to the court.

The district court then issued a permanent injunction in an unpublished order, approving with modifications the remedy proposed by the special master. Injunction, App. C to Petition for Writ of Certiorari (hereinafter Pet. App. C) at 57a-85a. Defendants' characterization of the injunction issued by the district court is materially incorrect in several respects. A description of the pertinent aspects of the injunction, and references to the inaccuracies contained in defendants' brief, are included in the section of this brief addressing the various aspects of the injunction that are challenged by defendants. See § V, *infra*.

F. The Appeal to the Ninth Circuit

²⁰(...continued)

listen to the calls and will leave the office if requested." Pets.' Brief at 8-9. This is directly contrary to the district court's findings that counselors had refused to leave the room during such calls, even when staff could view the prisoner through the office window. Pet. App. B at 38a. In fact, there had been a policy requiring the counselor to leave if requested during attorney-client telephone calls, but the policy was rescinded. R.T. 1/15/92 at 137; J.A. 207.

²¹ Contrary to the defendants' statement that documents being photocopied are not read (Pets.' Brief at 9), the district court made a finding that prisoners have observed people reading legal documents while copying them. Pet. App. B at 27a. In addition, contrary to the defendants' claim that prisoners receive photocopies within forty-eight hours or less of the request (Pets.' Brief at 9), the district court found that while generally photocopying was completed in this time period, prisoners in lockdown at Perryville had to wait as long as nine days. Pet. App. B at 37a.

Defendants appealed both the finding that prisoners had been unconstitutionally denied meaningful access to the courts and the district court's remedial order. The court of appeals affirmed the district court in most respects. *Casey v. Lewis*, 43 F.3d 1261 (9th Cir. 1994), App. A to Petition for Writ of Certiorari (hereinafter Pet. App. A). In particular, the court of appeals applied this Court's decision in *Bounds v. Smith*, 430 U.S. 817 (1977), to uphold the district court's requirement that illiterate prisoners, prisoners who do not speak English, and prisoners without direct access to a law library be given assistance in the form of a sufficient number of trained prisoner assistants. The court of appeals also affirmed various other aspects of the district court's order. The court of appeals vacated the portion of the order requiring typewriters, a provision setting the indigency standard, a provision setting the cost of photocopies, and a provision relating to payment of fees of the special master. Pet. App. A at 11a, 17a-18a.

On May 2, 1994, the order of the district court was stayed by this Court, pending disposition of the petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

The defendants argue that, under *Bounds v. Smith*, 430 U.S. 817 (1977), their only obligation is to provide prisoners with either an adequate law library or the assistance of persons trained in the law. Thus, the defendants argue, *Bounds* permits the State to satisfy its obligation to illiterate prisoners by giving them access to a collection of law books they cannot read. Similarly, defendants argue that providing a law library meets their obligation even for prisoners who scarcely have access to the books.

The defendants' interpretation of *Bounds* makes the right of meaningful access an empty formality. The right of access is not merely a passive right, protected from unjustified interference by prison officials. Rather, the right of access to the courts creates an affirmative duty on the part of prison officials, akin to the affirmative duty that this Court has recognized in other contexts when persons have been deprived of liberty by the State. This

affirmative duty extends to all prisoners. For prisoners who can use a law library without assistance, this obligation can be satisfied by providing a law library or person trained in the law. As the Court has repeatedly recognized, however, illiterate prisoners cannot use even an adequate law library without assistance; systems that provide law libraries to satisfy their obligation to provide access to the courts must assure that some additional assistance is available for illiterate prisoners.

The heart of the district court's findings is its conclusion that defendants did not provide meaningful access for illiterate prisoners and prisoners who lack direct access to a law library. The core remedial provisions flow directly from that violation; the district court, after a full trial and careful consideration of the facts, fashioned a remedy squarely within the mandate of *Bounds* that meaningful access to the courts must be provided to all prisoners.

Other aspects of the remedy, to the extent they are properly before this Court, were narrowly tailored and within the discretion of the district court. Throughout the remedial process, the wishes expressed by the defendants were afforded great deference and, in many respects, the proposed remedial order was modified to accommodate their concerns and objections.

ARGUMENT

I. PRISONS HAVE AN AFFIRMATIVE OBLIGATION TO ASSURE THAT ALL PRISONERS HAVE MEANINGFUL ACCESS TO THE COURTS.

The right of access to the courts is fundamental to a society based on law, even -- or especially -- for prisoners. "Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most 'fundamental political right, because preservative of all rights.'" *McCarthy v. Madigan*, 112 S. Ct. 1081, 1091 (1992) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

The importance of prisoners' ability to gain access to the courts *pro se* is nowhere better illustrated than in this Court's own

cases. Each of the last five decisions in this Court concerning the substantive rights of prisoners involved a case commenced and prosecuted by a prisoner proceeding without the assistance of counsel. *See Sandin v. Conner*, 115 S. Ct. 2293 (1995) (prisoner without counsel in district and appeals courts); *Farmer v. Brennan*, 114 S. Ct. 1970 (1994) (prisoner without counsel in district and appeals courts); *Helling v. McKinney*, 113 S. Ct. 2475 (1993) (prisoner without counsel in district and appeals courts; case tried to jury); *Hudson v. McMillian*, 503 U.S. 1 (1992) (prisoner without counsel in district and appeals courts; case tried to jury); *Wilson v. Seiter*, 501 U.S. 294 (1991) (prisoner without counsel in district court).

Much of defendants' argument is premised on the assertion that under *Bounds v. Smith*, 430 U.S. 817 (1977), their obligation to provide access to the courts is satisfied if they provide either an adequate law library or the assistance of persons trained in the law. *See* Pet. Brief at 33-36. This argument misreads *Bounds*. As set forth below, *Bounds* makes clear that prison officials have an affirmative obligation to provide all prisoners with meaningful access to the courts. *Bounds* specifically requires that States provide literate prisoners with either adequate law libraries or the assistance of persons trained in the law. *Bounds* also reaffirms the principle that illiterate prisoners require additional assistance. Thus, the affirmative obligation to provide illiterate prisoners with meaningful access to the courts is not satisfied by the mere provision of law libraries, as the courts below held.

A. This Court Has Recognized That Illiterate Prisoners Need Assistance.

In *Johnson v. Avery*, 393 U.S. 483 (1969), the Court struck down a regulation that barred prisoners from assisting other prisoners in preparing legal documents. Critical to the Court's holding was its reasoning that illiterate prisoners, without some form of assistance, cannot have meaningful access to the courts:

There can be no doubt that Tennessee could not constitutionally adopt and enforce a rule forbidding

illiterate or poorly educated prisoners to file habeas corpus petitions. Here Tennessee has adopted a rule which, in the absence of any other source of assistance for such prisoners, effectively does just that. The District Court concluded that "[f]or all practical purposes, if such prisoners cannot have the assistance of a 'jailhouse lawyer,' their possibly valid constitutional claims will never be heard in any court."

* * *

[T]he initial burden of presenting a claim to post-conviction relief usually rests upon the indigent prisoner himself with such help as he can obtain within the prison walls or the prison system. In the case of all except those who are able to help themselves -- usually a few old hands or exceptionally gifted prisoners -- the prisoner is, in effect, denied access to the courts unless such help is available.

Id. at 487-88 (internal citations omitted).

The Court reaffirmed, and expanded upon, this principle in *Wolff v. McDonnell*, 418 U.S. 539 (1974). The district court in *Wolff* had upheld a policy that limited prisoner-to-prisoner assistance because the warden had appointed a legal advisor to assist illiterate prisoners. *McDonnell v. Wolff*, 342 F. Supp. 616, 621 (D. Neb. 1972). The parties had stipulated that the law library's collection of books was generally adequate.²² The court of appeals vacated that order and remanded, indicating that the district court should reconsider whether more assistance than provided by the one prison advisor was necessary at the facility. *McDonnell v. Wolff*, 483 F.2d 1059, 1064-65 (8th Cir. 1973). This Court rejected the prison officials' challenge to the order for

²² See 342 F. Supp. at 618; see also *Bounds v. Smith*, 430 U.S. at 824.

remand, relying on *Johnson v. Avery*. The Court held that, although the relief sought might place "additional burdens" on prison officials, it was nonetheless justified. In affirming the order for remand, the Court said the following:

The right of access to the courts, upon which *Avery* was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights The recognition by this Court that prisoners have certain constitutional rights which can be protected by civil rights actions would be diluted if inmates, often "totally or functionally illiterate," were unable to articulate their complaints to the courts.

Wolff v. McDonnell, 418 U.S. at 579.²³

Thus, even before *Bounds v. Smith*, 430 U.S. 817 (1977), the Court accepted the principle that assuring meaningful access to the courts places affirmative burdens on prison officials, and that even adequate law libraries, by themselves, cannot assure access to the courts for illiterate prisoners.

B. An Adequate Law Library Satisfies a State's Obligation Only for Prisoners Capable of Using a Law Library.

Defendants argue that *Bounds* stands for the proposition that a State's entire obligation to assure meaningful access to the courts is satisfied by providing either law libraries or persons

²³ The officials argued that access to the courts is not required in connection with civil rights cases. The Court rejected this argument. *Wolff*, 418 U.S. at 579.

trained in the law. Pets.' Brief at 22-24.²⁴ This argument relies

²⁴ The defendants argue that most circuits have interpreted *Bounds* in this way. Pets.' Brief at 33-34 (citing *Campbell v. Miller*, 787 F.2d 217, 229-30 (7th Cir.), cert. denied, 479 U.S. 1019 (1986); *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 855 (9th Cir. 1985); *Hooks v. Wainwright*, 775 F.2d 1433, 1435 (11th Cir. 1985) cert. denied, 479 U.S. 913 (1986); *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985); and *Cepulonis v. Fair*, 732 F.2d 1, 6 (1st Cir. 1984)). However, none of these cases supports their claim, and the weight of authority is to the contrary. *Campbell* upheld the lack of provision of trained legal assistants for an individual plaintiff who was represented by an attorney and had access to a law library. See 787 F.2d at 220, 228-30. The court did not address the rights of illiterate and non-English speaking prisoners. *Lindquist* addressed whether attorneys must be provided to prisoners and did not decide whether assistance short of counsel was necessary: "Assuming the Constitution requires added assistance [to prisoners who are uneducated, illiterate or do not speak English], the plan complies by the use of inmate law clerks to meet the asserted deficit." 776 F.2d at 856. The court suggested this assumption was probably valid: "What is constitutionally adequate . . . cannot be determined solely by counting books and checking law library floor plans. A book and a library are of no use, in and of themselves, to a prisoner who cannot read." *Id.* at 855-56. *Hooks*, like *Lindquist*, held only that States need not provide prisoners with lawyers. 775 F.2d at 1437. Although the court did not address the rights of illiterate prisoners, the court noted that "*Bounds* surely did not hold that libraries must be provided to illiterate prisoners" because the fact that books are of "no use to the illiterate" is so obvious as to "need[] no discussion." *Id.* at 1436. In holding that illiterate prisoners need not be provided with lawyers, the *Hooks* court appeared to contemplate the availability of "writ-writers or nonlawyer law clerks" to assist them. *Id.* Indeed, the prison officials' plan for access in *Hooks* included prisoner law clerks and a standardized training system. See *Hooks v. Wainwright*, 536 F. Supp. 1330, 1340 (M.D. Fla. 1982). *Morrow* explicitly declined to issue a ruling on this question: "The issue [of whether the mere provision of a law library satisfies the rights of illiterate prisoners] is not before us because the magistrate concluded that the evidence presented on the literacy and educational backgrounds of the inmates at the jail was 'inconclusive.'" 768 F.2d at 623. However, the *Morrow* court did find that a bookmobile checkout system, accompanied by circumscribed assistance from law students, was inadequate under *Bounds*, even for prisoners who are able to help themselves. *Id.* Finally, *Cepulonis* explicitly noted that it was taking "no position" on whether any supplementation of the satellite library was required to address the rights of illiterate prisoners. The court was able to avoid the question because the defendants had themselves

(continued...)

on isolated passages in the opinion, directly contradicts other passages, and fails to do justice to the opinion as a whole.

It was critical to the Court's analysis that *Bounds*, unlike *Johnson* and *Wolff*, involved prisoners able to use a law library without assistance. Indeed, the Court began its analysis by stating that *Johnson* and *Wolff* had considered "whether the access rights of ignorant and illiterate inmates were violated without adequate justification." The Court then carefully stated that neither *Johnson* nor *Wolff* "considered the question we face today and neither is inconsistent with requiring additional measures to assure meaningful access to inmates able to present their own cases." *Id.* (Emphasis added).

It is particularly significant that the Court, in discussing its earlier decisions, noted that *Wolff* involved a prison that already contained an adequate law library. *Bounds*, 430 U.S. at 824. Similarly, the Court pointed out that in *Procunier v. Martinez*, 416 U.S. 396 (1974), it had granted relief on an access to courts claim

²⁴(...continued)

suggested that prisoners be assisted by a prisoner legal clerk. 732 F.2d at 7.

The courts of appeals that have decided the issue have consistently held that prison officials must provide illiterate prisoners with some assistance from persons knowledgeable about the law. See, e.g., *Knop v. Johnson*, 977 F.2d 996, 1006 (6th Cir. 1992), cert. denied, 113 S. Ct. 1415 (1993) ("For prisoners [who are unable to present their claims to the courts on their own], there can be no meaningful access to the judicial system unless some literate person is available to reduce their stories to intelligible written pleadings"); *Valentine v. Beyer*, 850 F.2d 951, 956-57 (3d Cir. 1988) (affirming district court's order prohibiting the State from closing a paralegal clinic, based on the "needs of those in closed custody [who are denied access to the law library] and illiterate and non-English speaking inmates who are totally dependent upon paralegal assistance in their legal endeavors"); *Harrington v. Holshouser*, 741 F.2d 66, 69-70 (4th Cir. 1984) (later stage of *Bounds* litigation) (remanding to district court with instructions to make findings of fact regarding the training of prison paralegals, noting that an "important deficiency in the State's efforts toward implementation is its apparent lack of a program to train prisoner paralegals to assist inmates in the use of the library"); *Cruz v. Hauck*, 627 F.2d 710, 721 (5th Cir. 1980) ("Library books, even if 'adequate' in number, cannot provide access to the courts for those persons who do not speak English or who are illiterate").

despite the fact that the prison in question provided adequate law libraries. *Bounds*, 430 U.S. at 824 n.11. Thus, the Court in *Bounds* recognized that the mere provision of an adequate law library does not satisfy the obligation to provide access to the courts for illiterate prisoners.

This reading of *Bounds* is consistent with the actual relief afforded in that case. Although the suitability of the remedial plan submitted by the State was not directly before the Court because the prisoners did not cross-petition for certiorari,²⁵ the State's plan, as the Court noted, included the training of prisoner law clerks to aid fellow prisoners. *Id.* at 819-20. The plan specifically contemplated that the prisoners who were trained as research assistants and typists would aid illiterate prisoners: "Those inmates who work in the libraries will be assigned library duties on a permanent basis. They will be trained to the best extent possible in researching legal questions and assisting inmates in their research. They will also be permitted to help illiterate and semi-illiterate inmates." *Smith v. Bounds*, 538 F.2d 541, 543 n.1 (4th Cir. 1975); see also *Bounds*, 430 U.S. at 819. Finally, and critically, this reading is consistent with the basic principle articulated in *Bounds* that the fundamental constitutional right of access to the courts requires prison authorities to assist all prisoners in the preparation and filing of meaningful legal papers. *Id.* at 824, 828.

C. Prison Officials Have an Affirmative Duty to Protect Prisoners' Right of Meaningful Access to Courts.

In *Bounds*, this Court delivered its most extensive opinion on the subject of assuring prisoners meaningful access to the courts. The Court flatly rejected the prison officials' argument that their only obligation was a purely negative one, limited to avoiding the creation of obstacles to the right of access to the courts:

²⁵ See 430 U.S. at 821 n.7.

Petitioners contend, however, that this constitutional duty merely obliges States to allow inmate "writ writers" to function. They argue that under *Johnson v. Avery*, *supra*, as long as inmate communications on legal problems are not restricted, there is no further obligation to expend state funds to implement affirmatively the right of access. This argument misreads the cases.

* * *

[O]ur decisions have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts This is not to say that economic factors may not be considered, for example, in choosing the methods used to provide meaningful access. But the cost of protecting a constitutional right cannot justify its total denial. Thus, neither the availability of jailhouse lawyers nor the necessity for affirmative state action is dispositive of respondents' claims.

Id. at 823-24, 825.

Defendants argue that the obligation of the States to provide meaningful access to the courts is satisfied if the State eliminates those barriers to access that are inherent in the fact of incarceration. Pets.' Brief at 28-29.²⁶ Later, however,

²⁶ In making this argument, defendants and *amici* extensively rely on *Ross v. Moffitt*, 417 U.S. 600 (1974) (State need not provide counsel for prisoners seeking direct, discretionary appeals to state Supreme Court or United States Supreme Court); *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (State not required to provide an attorney to inmates seeking post-conviction, habeas corpus relief in state court); and *Murray v. Giarratano*, 492 U.S. 1 (1989) (State not obligated to provide attorney to death row inmate seeking post-conviction relief in state court). These cases are inapposite because they addressed the limited question of whether an attorney must be provided to represent these prisoners. Plaintiffs' claim is that illiterate prisoners are entitled to assistance from a literate fellow prisoner, not from a lawyer.

defendants refer to the States' affirmative obligation to provide access to the courts (Pets.' Brief at 33), conceding that an affirmative duty exists.

Defendants' concession is unavoidable. In *Bounds* the Court noted that its decisions "have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts," 430 U.S. at 824, and it imposed significant costs and burdens on prison officials by requiring prison officials to provide either libraries or persons trained in the law. *Id.* at 828.²⁷ Building and operating a law library is an affirmative undertaking; indeed, it is a more burdensome obligation than providing minimal training for prisoner legal assistants.

The affirmative duty recognized in *Bounds* is parallel to the affirmative duties imposed by the Eighth Amendment and the Due Process Clause when the State deprives a prisoner of liberty.²⁸ These duties arise because of prisoners' special needs and vulnerabilities:

The rationale for the [imposition of affirmative duties] is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself...it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.... The affirmative duty to protect arises ... from the limitation which it has imposed on his freedom to act in his own behalf.

²⁷ This aspect of the holding in *Bounds* applies to those prisoners able to use a library on their own. See § I.B., *supra*.

²⁸ See *Wilson v. Seiter*, 111 S. Ct. 2321, 2327 (1991) (prisoners must be provided with basic life necessities such as food, warmth, and exercise); *Estelle v. Gamble*, 429 U.S. 97 (1976) (prisoners must be provided with treatment for their serious medical needs); *Farmer v. Brennan*, 114 S. Ct. 1970, 1976 (1994) (prisoners' personal safety must be protected); cf. *Bounds*, 430 U.S. at 824 (indigent prisoners must be provided with legal supplies).

DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 200 (1989) (internal citations omitted); accord *Farmer v. Brennan*, 114 S. Ct. 1970, 1976-77 (1994) ("having stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course") (internal citations omitted).²⁹

D. The Provision of Legal Assistance to Illiterate and Non-English Speaking Prisoners Does Not Make Them "Better Off" Than Their Civilian Counterparts.

Akin to the argument that access to the courts imposes no affirmative duty on prison officials is defendants' argument that the provision of assistance by persons with legal training to illiterate prisoners, and the provision of assistance by trained, bilingual assistants to non-English speaking prisoners, makes these prisoners "better off" than their civilian counterparts. Pets.' Brief at 44-45.

As the Ninth Circuit acknowledged, this argument "overlooks the fact that the restrictions on a prisoner's liberty attendant to imprisonment prevents the prisoner from enlisting the assistance of his family, friends, and a myriad of social services and legal aid organizations that would otherwise be available." Pet. App. A at 9a.

Moreover, the comparison between prisoners and their civilian "counterparts" (Pets.' Brief at 45) is meaningless because prisoners simply do not have civilian "counterparts" in this

²⁹ The defendants claim that *Turner v. Safley*, 482 U.S. 78 (1987), limits the right of access to the courts. See Pets.' Brief at 20-21, 42-44. This Court, however, has never applied a *Turner* analysis to limit prison officials' affirmative duties. Rather, *Turner* applies to regulations that restrict the exercise of prisoners' rights. The right of access to the courts imposes both an affirmative duty and an obligation to refrain from placing unnecessary burdens on that right. See note 58, *infra*. Thus, the affirmative duty to provide access to courts in *Bounds* is not limited by *Turner*, although particular prison rules regulating access may be appropriately analyzed under *Turner*.

context. It is the very fact of incarceration that gives rise to prisoners' right of access to the courts. The two kinds of legal actions most basic to the right of access are civil rights claims challenging conditions of confinement and habeas corpus petitions challenging the duration of confinement. *Bounds*, 430 U.S. at 823; *Wolff*, 418 U.S. at 579. The very nature of these claims is that they can be asserted only by prisoners.

As noted above, this Court has recognized that the special needs and vulnerabilities of prisoners give rise to affirmative duties on the part of prison officials. Similarly, the Court has recognized that in a variety of contexts non-English speakers require affirmative assistance if certain rights are to be meaningful.³⁰ This assistance does not make these groups "better off" than others; it simply makes the right or privilege at issue effective or meaningful.

E. The Nature of Habeas Corpus Petitions and Civil Rights Claims Does Not Obviate the Need for Assistance.

Defendants argue that prisoners who file habeas corpus

³⁰ This principle has been recognized in the realms of criminal proceedings, *see, e.g., United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970) (a defendant who cannot speak or understand English enjoys "a right to have his trial proceedings translated" to enable him to "participate effectively in his own defense") (emphasis added); *United States v. Lam Kwong-Wah*, 924 F.2d 298, 309 (D.C. Cir. 1991); *United States v. Gallegos-Torres*, 841 F.2d 240, 242 (8th Cir. 1988)); the right to vote, *see, e.g., Puerto Rican Org. for Political Action v. Kusper*, 490 F.2d 575, 580 (7th Cir. 1973) (to render right to vote *effective*, non-English speaking voters entitled to adequate assistance in rendering ballots comprehensible to them); *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974); and public education, *see, e.g., Lau v. Nichols*, 414 U.S. 563, 566 (1974) (the classroom experiences of non-English speaking children will not be "meaningful" if they are "merely ... provid[ed] ... with the same facilities, textbooks, teachers, and curriculum") (emphasis added). For a more extensive discussion of this principle, *see* brief of amici curiae the Mexican American Legal Defense and Educational Fund, the Puerto Rican Legal Defense and Education Fund, and the National Asian Pacific American Legal Consortium.

petitions and civil rights claims need only "present the facts underlying their claims, for which they can rely on their personal knowledge."³¹ *Pets.* Brief at 26. They further argue that all federal circuits and many state courts evaluate *pro se* pleadings under less stringent standards, so that the right of access to courts need only enable prisoners to submit filings that are "minimally adequate." *Pets.* Brief at 24-27.

In *Bounds*, the Court rejected this very argument. The Court stated the following:

Although it is essentially true ... that a habeas corpus petition or civil rights complaint need only set forth facts giving rise to the cause of action, ... it hardly follows that a law library or other legal assistance is not essential to frame such documents. It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties, plaintiff and defendant, and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action. If a lawyer must perform such preliminary research, it is no less vital for a *pro se* prisoner. Indeed, despite the "less stringent

³¹ Amici argue that states should not be required to expend resources, beyond the provision of a law library, on assisting prisoners because habeas corpus petitions are of "secondary" importance. Brief of National Conference of State Legislatures at 12-13, 13 n.6. This argument has been rejected by the Court on numerous occasions. *Johnson v. Avery*, 393 U.S. 483, 485-86 (1969); *Bounds*, 430 U.S. at 827; *see also Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy J., and O'Connor J., concurring) ("It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death"); *O'Neal v. McAninch*, 115 S. Ct. 992, 996 (1995) ("the errors being considered by a habeas court occurred in a criminal proceeding, and therefore, although habeas is a civil proceeding, someone's custody, rather than mere civil liability, is at stake") (emphasis in original).

standards" by which a *pro se* pleading is judged, it is often more important that a prisoner complaint set forth a nonfrivolous claim meeting all procedural prerequisites, since the court may pass on the complaint's sufficiency before allowing filing *in forma pauperis* and may dismiss the case if it is deemed frivolous. Moreover, if the State files a response to a *pro se* pleading, it will undoubtedly contain seemingly authoritative citations. Without a library, an inmate will be unable to rebut the State's argument.

Bounds, 430 U.S. at 825-26 (internal citations, quotation marks, and paragraph break omitted).

Similarly, without assistance from someone with at least minimal legal knowledge, an illiterate prisoner would be unable to make threshold decisions regarding jurisdiction, venue, standing, exhaustion of remedies, proper parties, and the kinds of relief available, and would be unable to respond to the arguments made by the State in a responsive pleading.

II. THE LOWER COURTS IN THIS CASE PROPERLY FOUND A VIOLATION OF THE RIGHT OF ACCESS TO THE COURTS.

The district court's findings of a violation of the right of access to the courts relate to two large and overlapping groups of prisoners: prisoners who are illiterate or non-English speaking and therefore unable to use a law library on their own; and prisoners unable to obtain direct access to law library books.

A. Illiterate Prisoners Are Denied Meaningful Access.

Defendants have never challenged the district court's finding that there are substantial numbers of prisoners whose

illiteracy precludes them from using a law library on their own.³² See Pet. App. B. at 25a. The district court further found that the only persons assisting illiterate prisoners are the prisoner legal assistants, who are too few in number and too poorly trained, if trained at all, to provide assistance to their illiterate fellows. Pet. App. B. at 28a, 30a. As a result of the inability of illiterate prisoners to receive adequate assistance, prisoners have had their cases dismissed with prejudice and other prisoners have been unable to file legal actions. Pet. App. B. at 25a.

In light of these findings, the district court correctly concluded that the right of access to courts had been violated with respect to illiterate and non-English speaking prisoners. The central holding of *Bounds* is that prison officials must provide prisoners with "adequate, effective and meaningful" access to the courts. 430 U.S. at 822. A library, without more, does not provide "adequate, effective and meaningful access" for someone who cannot read, and a library in English does not meet the *Bounds* standard for someone who cannot read English. See § I, *supra*. These obvious propositions support the district court's holding that illiterate and non-English speaking prisoners require the assistance of fellow prisoners who are capable of using law libraries, and that assuring the availability of capable prisoners is an obligation of the ADOC.

B. The Paging System Available to Lockdown Prisoners Does Not Provide Them with Meaningful Access.

Although the ADOC has law libraries, many prisoners are not allowed to use them. The prisoners who experience the greatest difficulties in gaining access to law books are lockdown prisoners. In theory, these prisoners have indirect access to the law libraries through a paging system. In reality, they are

³² This finding is consistent with this Court's observation in *Johnson* that "[j]ails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." 393 U.S. at 487.

restricted in the number of books they can request at a time and the length of time they can keep the books, and they often must give an exact citation in order to receive a book. They routinely experience long delays in receiving requested materials. Prisoners who are in lockdown for less than fifteen days are denied any access to law books; at all times they are denied contact with prisoner legal assistants unless they have a pending disciplinary or criminal charge. The district court found that the combination of these practices caused "severe interference" with access to courts for lockdown prisoners. Many non-lockdown prisoners are in a similar situation: they can go to the library but they are not allowed access to the shelves, and are dependent on others to bring them the items that they request. See Statement of the Case at 2-4.

Providing a library for persons whose use of its contents is so restricted does not provide "adequate, effective and meaningful" access to the courts as required by *Bounds*. 430 U.S. at 822-23.³³ A lawyer, let alone a person reading below the eighth grade level, could scarcely do meaningful research when limited to requesting one specific book at a time, with nothing to provide guidance on how to do research and prepare pleadings. Accordingly, the district court correctly found that "[e]ven lockdown prisoners who are intelligent, literate and legally trained are unable to do legal research under [a] paging system that allows only one or two books at a time every couple of days." Pet. App.

³³ Amici argue that *Murray v. Giarratano*, 492 U.S. 1 (1989), held that giving prisoners "adequate and timely access to a law library" or permitting them to have law books in their cells was constitutionally adequate. Brief of National Conference of State Legislatures, *et al.* (citing *Murray*, 492 U.S. at 5, 12). The plurality opinion in *Murray* did not state that providing access to a law library or giving a prisoner books in his cell satisfies the right of access to the courts. *Murray* addressed only the limited question of whether death row prisoners are entitled to the appointment of individual counsel for post-conviction appeals. In fact, the system for access to the courts in *Murray* included the provision of lawyers to act as legal advisors to the death row prisoners. *Id.* at 5; see also *id.* at 14-15 (Kennedy, J., concurring). The system thus provided far more assistance than was required by the district court in this case.

B. at 24a.³⁴ This conclusion is consistent with that of other courts that have examined similar paging systems.³⁵

In sum, the district court correctly found that the bare provision of a law library to the numerous illiterate and non-English speaking prisoners in the custody of the ADOC, and the "paging system" that is available to lockdown prisoners, were inadequate to provide these prisoners with meaningful access to the courts.

III. THE ISSUE OF "ACTUAL INJURY" IS NOT PRESENTED FOR REVIEW; IN ANY EVENT ONLY POTENTIAL OR ACTUAL INJURY IS REQUIRED.

A. Whether a Plaintiff Must Show "Actual Injury" Is Not Properly Presented for Review by this Court.

Defendants argue that the lower courts erred by making findings of liability without proof as to actual injury and causation, which defendants claim are necessary to a finding of a violation of the right of legal access. Pets.' Brief at 30. Defendants, however,

³⁴ It is possible that an efficient paging system, with provision to prisoners of an inventory of the law library's contents and prompt delivery of requested materials, would pass constitutional muster for those prisoners who are able to use a law library on their own. The district court was correct, however, in finding that the extremely restrictive paging system that was available to prisoners in the ADOC was constitutionally inadequate.

³⁵ See also *Knop v. Johnson*, 977 F.2d 996, 1005-07 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1415 (1993); *DeMallory v. Cullen*, 855 F.2d 442, 446-47 (7th Cir. 1988); *Toussaint v. McCarthy*, 801 F.2d 1080, 1108-10 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *Corgain v. Miller*, 708 F.2d 1241, 1250 (7th Cir. 1983); *Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978), *cert. denied*, 442 U.S. 911 (1979); *Kaiser v. City of Sacramento*, 780 F. Supp. 1309, 1316 (E.D. Cal. 1991); *Nolley v. County of Erie*, 776 F. Supp. 715, 741 (W.D.N.Y. 1991); *Messere v. Fair*, 752 F. Supp. 48, 50 (D. Mass. 1990); *Maillett v. Phinney*, 741 F. Supp. 288, 292 (D. Me. 1990); *Johnson v. Galli*, 596 F. Supp. 135, 138 (D. Nev. 1984); *Martino v. Carey*, 563 F. Supp. 984, 1003-04 (D. Or. 1983).

never designated the "actual injury" question as one of the "Issues Presented for Review" in defendants' opening brief in the Ninth Circuit. See Appellants' Opening Brief at 3. Moreover, defendants' briefs in the court of appeals made no general argument that "actual injury" was required. Instead, they conceded that "actual injury" need not be shown for "core" challenges to the denial of the right of access to the courts, but argued that it must be shown for the "non-core" challenges to the photocopying policy, the attorney telephone call policy, and the provision for typewriters.³⁶ It is presumably for this reason that the court of appeals found that "th[e] issue [of whether plaintiffs must show actual injury] is not now before us." Pet. App. A at 6a n.3.

The Court should also decline to reach this question, pursuant to the general principle that issues that were not presented to the court below will not be ruled upon by this Court. See, e.g., *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Silber v. United States*, 370 U.S. 717, 718 (1962).

Moreover, this case presents an inappropriate vehicle to decide whether "actual injury" is required because the district court made explicit findings that illiterate prisoners had had their cases dismissed with prejudice, and had been unable to file legal actions, as a result of their inability to receive adequate legal assistance. Pet. App. B at 25a. Defendants' challenge to these findings was rejected by the court of appeals, Pet. App. A at 8a, and they do not argue here that those findings were clearly erroneous. Accordingly, this case does not squarely present the issue of

³⁶ See Appellants' Brief at 29-30, 31, 42. In their reply brief, the defendants argued that there was no evidence that illiterate prisoners were denied access to the courts. Appellants' Reply Brief at 2. In context, this appears to be an argument that the district court's findings to the contrary were clearly erroneous. The defendants' other references to the issue are simply statements that plaintiffs failed to make a showing of injury. See Appellants' Opening Brief at 10, 36 and Appellants' Reply Brief at 2.

whether, and to what extent, an "actual injury" requirement applies to cases under *Bounds*.

B. Injunctive Relief May Be Granted on a Showing of Potential, as Well as Actual, Injury.

Defendants argue that an "actual injury" requirement is supported by the "plain words" of Section 1983, which "impose[s] liability -- whether for damages or an injunction -- only for conduct which 'subjects, or causes to be subjected,' the complainant to a deprivation of federal rights. Pets.' Brief at 30. They further argue that courts may be well-equipped to address questions of causation and injury based on past events, but not to decide questions based on hypothetical future injury. *Id.*³⁷

³⁷ Defendants state that "[m]ost federal courts" have required a showing that "some identifiable prison policy or resource deficiency caused them actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim." Pets.' Brief at 30-31 and 30 n.19 (citing *Strickler v. Waters*, 989 F.2d 1375, 1383 n.10 (4th Cir.), cert. denied, 114 S. Ct. 393 (1993); *Crawford-El v. Britton*, 951 F.2d 1314, 1322 (D.C. Cir. 1991), cert. denied, 113 S. Ct. 62 (1992); *Shango v. Jurich*, 965 F.2d 289, 292 (7th Cir. 1992); *Twyman v. Crisp*, 584 F.2d 352, 357 (10th Cir. 1978); and *Vandelft v. Moses*, 31 F.3d 794, 797 (9th Cir. 1994), petition for cert. filed (U.S. Apr. 12, 1995) (No. 94-8879)).

The cases cited by defendants do not all support the proposition for which they are cited. One of the cases, involving a one-time misdelivery of legal papers, held that a showing of actual injury is required only when the violation involves an "isolated episode," *Crawford-El*, 951 F.2d at 1321. Another one held that an actual injury requirement does not apply when the challenge is to the adequacy of either the law library or legal assistance. *Vandelft*, 31 F.3d at 796. In fact, most courts have found that a showing of "actual injury" is not necessary to prove a constitutional violation, or at least not for claims that involve "core," "major," or "systemic" violations of the right of access to courts. Such cases include *Muhammad v. Pitcher*, 35 F.3d 1081, 1083-84 (6th Cir. 1994) ("chilling effect" caused by opening of legal mail constitutes "injury in fact"); *Hershberger v. Scaletta*, 33 F.3d 955, 956 (8th Cir. 1994) (denial of free postage to indigents); *Ruark v. Solano*, 928 F.2d 947, 950 (10th Cir. 1991) (denial of access to any legal materials for nine month period); *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990) (request for

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Defendants' argument goes too far. If accepted, it would abolish a large part of the injunctive jurisdiction of the federal courts. After all, the very purpose of an injunction is to prevent injury. The Court's own recent prison jurisprudence illustrates this point. In connection with prisoner-on-prisoner violence, the Court reaffirmed that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Farmer v. Brennan*, 114 S. Ct. 1970, 1983 (1994) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). Similarly, the Court held that exposure to hazardous prison conditions is actionable based on the likelihood of future injury, observing that "[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Helling v. McKinney*, 113 S. Ct. 2475, 2480-81 (1993). It would be equally odd to hold that an access-to-courts system that fails to address the needs of a large, identifiable segment of the prison population cannot be the subject of injunctive relief when the prospect of injury to some class members, and the corresponding need for relief, is plain.³⁷ Furthermore, the inability to determine

³⁷(...continued)

preliminary injunction to prohibit prison officials' refusal to deliver legal mail under different surname); *Roman v. Jeffes*, 904 F.2d 192, 198 (3d Cir. 1990) (refusal of prison officials to allow plaintiff to bring all his legal research notes, copies of orders issued in cases in which plaintiff was involved, or pleadings filed by opposing parties when plaintiff was transferred from one facility to another); *Peterkin v. Jeffes*, 855 F.2d 1021, 1041-42 (3d Cir. 1988) (denial of access to law library and law clinic workers, with availability of paging system alone); *DeMallory v. Cullen*, 855 F.2d 442, 448-49 (7th Cir. 1988) (no library time, books available only on written request, and paralegal consultation available only by correspondence); *Harris v. Young*, 718 F.2d 620, 622 (4th Cir. 1983) (failure to provide sufficient access to adequate library).

³⁸ The defendants' argument does not distinguish between the distinct issues of standing and liability. In order to have standing to bring a challenge under § 1983, a plaintiff must suffer actual or threatened injury. *Association of Data Processing Orgs. v. Camp*, 397 U.S. 150, 152 (1970); see also *Schwartz & Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees*, Vol I at 67 (2d (continued...)

whether one has a claim in the first place is itself an injury:

[T]he right to be protected is the right to have a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Bounds*, 430 U.S. at 825, 97 S. Ct. at 1496. Because an inmate is unable to discover his rights when library access or other access to the law is denied him, any complaint rightly alleging a present denial of access to a library or other assistance states a valid claim for equitable relief. It is unfair to force an inmate to prove that he has a meritorious claim which will require access until after he has had an opportunity to see just what his rights are. Not only unfair, it is jurisprudentially unnecessary.

Harris v. Young, 718 F.2d 620, 622 (4th Cir. 1983).³⁹

Defendants also argue that the constitutional right at issue is access to courts, rather than access to libraries or legal assistance, so that the right is violated "only when prison policies result in *actual* denial of court access." *Pets.* Brief at 31. The distinction drawn by defendants between access to law books or legal information and access to the courts is an empty one, because denial of the means necessary to exercise a right is the functional

³⁹(...continued)

ed. 1991). Furthermore, to have standing to seek injunctive and declaratory relief, the threat of future injury must be "real or immediate." *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Accordingly, the standard for determining standing and the appropriateness of injunctive relief encompasses both actual and threatened injury. Defendants' confusion of the issues of standing and liability is evidenced by the fact that, when they presented this issue to the court of appeals, they asserted that the lack of "actual injury" deprived plaintiffs of standing. See Appellants' Opening Brief at 28. Defendants now concede that plaintiffs had standing to raise the claims in this suit. *Pets.* Brief at 33 n.23.

³⁹ For this reason the defendants' emphasis on "actual injury" is a misnomer because, as the court noted in *Harris*, the inability to determine whether one has a claim is, in defendants' terms, an "actual injury."

equivalent of a denial of the right itself.⁴⁰

Finally, defendants argue that without an "actual injury" requirement, prisoners could obtain relief based on generalized complaints about their law library or legal assistance program and courts would be free to implement their own visions and ideals for State prisons, with inadequate standards to guide their discretion. Pets.' Brief at 31-32. But this Court has developed appropriate standards for testing whether a constitutional violation has occurred, even in situations involving prospective injury. *Helling v. McKinney*, 113 S. Ct. 2475, 2480-81 (1993), for example, did not change the substantive standard for an Eighth Amendment violation; it merely held that the plaintiff need not wait to sue until he has already been injured by the challenged condition.

IV. THE DISTRICT COURT AFFORDED PRISON AUTHORITIES AMPLE DEFERENCE IN FORMULATING THE INJUNCTION.

The district court acted with care and deliberation in setting up a process to develop an appropriate remedy. The court appointed a special master to make recommendations to the district court. The order appointing the master specifically limited his role "to investigat[ing] and report[ing] about how best to accomplish the goal of constitutionally adequate inmate access to the courts." Order Appointing Special Master, Pet. App. E at 87a. The district court was free to "accept," "modify," or "reject" the master's recommendations. *Id.* at 91a.⁴¹ Because the district court had

⁴⁰ As noted above, a prisoner who lacks access to law books or legal information will not be able to determine whether she has a claim to present to the courts.

⁴¹ The defendants claim that the "special master and his assistant billed ADOC an average of approximately \$12,000 per month in fees and costs while monitoring the prison system before this Court issued the stay, even though the injunction was not yet implemented." Pets.' Brief at 11. The Ninth Circuit vacated and remanded the order relating to the fees and costs of the special master, so this issue is not before the Court. In any event, the plaintiffs have
(continued...)

decided an earlier case involving access to the courts for the prisoners in an Arizona prison,⁴² the special master was instructed to use the injunction adopted in that case as the starting point for the injunction in this case. Pet. App. B at 48a-49a. Over a number of months the special master met on five occasions with defendants, received five sets of objections from them, and with their cooperation, developed a remedy. The Commentary to the injunction reveals that the special master adopted a substantial number of defendants' requests, modifying the order in numerous respects to accommodate concerns and objections of defendants.⁴³ Indeed, in some instances, the master provided the ADOC with greater flexibility than defendants requested.⁴⁴ The Commentary also reveals that the master carefully considered those requests of defendants that he ultimately decided to reject.

Accordingly, the order represents a thoughtful and cautious approach to remedying the constitutional violations, based on defendants' suggestions and the experience accumulated under an

⁴¹(...continued)

reviewed the records related to the fees and expenses of the master and believe that the defendants' claims are not factually correct. Aside from significantly overstating the amount of fees and costs involved, the defendants in their brief fail to mention that the amount billed by the master included fees and costs incurred in other cases, including *Gluth*, as well as other matters involving the ADOC.

⁴² See *Gluth v. Kangas*, 773 F. Supp. 1309 (D. Ariz. 1988), *aff'd*, 951 F.2d 1504 (9th Cir. 1991).

⁴³ This Commentary notes that in response to defendants' concerns, the special master eliminated or reduced many requirements of the injunction. For example, the hours of operation of the law libraries were reduced; the number of facilities required to maintain law libraries was reduced; the requirements for legal assistant training were reduced; the availability of notary services was reduced; and the time to respond to prisoner requests for legal assistance was increased. Pet. App. C at 81a-85a.

⁴⁴ See Commentary, Pet. App. C at 81a ("Although not requested, the Proposed Order [] allows ADOC to operate facilities without law libraries if the population is less than 150") ("The [Proposed Order] reduces the total time requirements in most facilities that ... require advance scheduling. This was done on the initiative of the Special Master based on an assessment of lesser-capacity institutions").

earlier case involving the same prison system and the same district court. The district court thus fully heeded the admonition of this Court in *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977), that the federal courts, in devising a remedy for constitutional violations, must take into account the interests of state and local authorities in managing their own affairs.

V. THE REMEDIAL MEASURES CHALLENGED BY DEFENDANTS WERE NARROWLY TAILORED.

Once a district court has found a constitutional violation, its most fundamental obligation is to eliminate it. The court must craft a remedy that is tailored to cure the condition that offends the Constitution, or conditions that flow from such a violation. *Milliken v. Bradley*, 433 U.S. 267, 282 (1977). In performing this task, "the scope of [the] court's equitable powers...is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

In *United States v. Paradise*, 480 U.S. 149, 183 (1987), in reviewing an order addressing employment discrimination by a governmental agency, the Court "acknowledge[d] the respect owed a district judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment." The Court also rejected the argument that remedial plans are necessarily limited to the least restrictive means of implementation. *Id.* at 184. Because the district court is more qualified to deal with the "flinty, intractable realities of day-to-day implementation of those constitutional commands,"⁴⁵ the district court was in the best position to determine the form of the injunctive remedy to cure the constitutional default. *Id.* *Accord Hutto v. Finney*, 437 U.S. 678, 688 (1978) (affording "special deference because of the trial judge's years of experience with the problem at hand"). That principle is particularly apt here, where the district court has prior experience with the same issues in a prison operated by the same defendants. See *Gluth v. Kangas*, 951 F.2d 1504 (9th Cir. 1991),

⁴⁵ *Id.*, quoting *Swann*, *supra*, 402 U.S. at 6.

aff'g 773 F. Supp. 1309 (D. Ariz. 1988).

The district court's findings of various constitutional violations, and the injunction adopted to remedy those violations, were based on a three-month trial during which almost every fact was vigorously contested. The court considered hundreds of exhibits and heard the testimony of scores of witnesses. The painstaking manner in which the district court judge considered that evidence and testimony is made abundantly clear by the written opinion finding a constitutional violation, which is heavily supported by citations to the trial record.

The process of crafting a remedy took place over an eight-month period, during which the parties were given numerous opportunities to meet with the special master and to present their objections to him. The master considered each of those objections, accepting many, and explaining his reasons for rejecting others. Thereafter, the proposed order was presented to the district court, with a Commentary explaining the reasons behind the terms of the injunction.

This process was amply deferential to defendants' concerns. It was a process handled by a judge and a special master who have, for the past several years, overseen other litigation involving the same prison system. It is appropriate for such exhaustive fact-finding to occur at the trial-court level. The carefully crafted remedy was reviewed, and largely affirmed, by the court of appeals. This Court should approve the responsible work of the lower courts.

The heart of the remedy here is the provision for training legal assistants to help illiterate prisoners and prisoners without direct access to law books. These provisions cannot be removed without gutting the effectiveness of the remedial order. Accordingly, plaintiffs will primarily focus on these aspects of the remedy. Other provisions of the injunctions were appropriately committed to the discretion of the district court.

Defendants argue that seven particular provisions of the remedy adopted by the district court should be vacated as

overbroad. *See* Pets.' Brief at 39-47.⁴⁶ In fact, these remedial measures comply with the principles of equitable discretion described above. Various other aspects of the injunction that are mentioned in defendants' brief, albeit only in passing, were neither raised before, nor passed upon by, the court of appeals, and therefore are not properly presented for review by this Court.⁴⁷

⁴⁶ The provisions involve the following: (1) Library contents and staffing; (2) library hours; (3) library access; (4) legal assistance; (5) legal assistance to functionally illiterate prisoners; (6) access to counsel; and (7) photocopying. Pets.' Brief at 39-47. Each of these is addressed below, although numbers (4) and (5) are treated together, in light of the fact that the district court's remedy regarding the provision of legal assistants was limited to illiterate and non-English speaking prisoners, and those without access to the law library shelves. In their Petition for Writ of Certiorari, defendants argued that the lower court required the ADOC to provide all prisoners with the assistance of persons with legal training. Pet. for Cert. at 3, 7. It is difficult to discern whether defendants wish to maintain this argument. *Compare* Pets.' Brief at 44-45 (arguing that the law does not require the provision of legal assistance to illiterate and non-English speaking prisoners) *with* Pets.' Brief at 45 (taking issue with "the injunction's requirement that Arizona furnish trained, bilingual legal assistants to all inmates"). Regardless of defendants' intentions, as noted by the Ninth Circuit, any assertion that the district court ordered the provision of trained assistants to all prisoners is erroneous. Pet. App. A at 16a. The district court's finding of a denial of access to courts was limited to illiterate and non-English speaking prisoners and prisoners lacking direct access to a law library. Pet. App. B at 41a-44a; Pet. App. C at 69a. The injunction adopted by the district court does not prevent the ADOC from limiting the availability of legal assistants to these prisoners. *See* Pet. App. C. Plaintiffs offer to prove, if this issue is remanded, that the special master on several occasions offered to include an eligibility scheme in the proposed injunction, but that defendants refused this offer, apparently because of the administrative burden of implementing such a scheme.

Defendants also argue that the injunction must be reversed in its entirety because it is not narrowly tailored. *See* Pets.' Brief at 37-39. However, as demonstrated in this section, even those aspects of the injunction that defendants allege are particularly overbroad were proper under the circumstances of this case. Furthermore, even if particular provisions of the injunction are overbroad, they should be addressed individually.

⁴⁷ These references are to the following aspects of the injunction: (1) The kind and quantity of supplies that must be provided to "all prisoners," Pets.' (continued...)

A. Provisions of the Injunction Related to Trained Prisoner Assistants

Defendants and *amici* argue that the injunction adopted by the district court to remedy the violation of the rights of illiterate and non-English speaking prisoners, as well as those without direct access to the law library shelves, is overbroad because it regulates the selection, number, training, and retention of legal assistants. Pets.' Brief at 10 and 44-45; Brief of Criminal Justice Legal Foundation at 18. In fact, the injunction adopted by the lower court did no more than remedy the constitutional violations found by the court. Plaintiffs will address each aspect of the injunction in turn.

1. Selection of Legal Assistants

The district court found that there were no specific knowledge or performance requirements, and no required training, for the position of legal assistant. Pet. App. B at 30a-31a. The court further found that the legal assistants available to illiterate and non-English speaking prisoners were frequently insufficiently skilled to provide adequate services. Pet. App. B at 30a.

⁴⁷(...continued)

Brief at 36. In fact, this provision applies only to indigent prisoners. Pet. App. C at 78a-79a. (2) The procedures for removing from the library prisoners who create disturbances, Pets.' Brief at 11. (3) The noise level of libraries, Pets.' Brief at 11. (4) The requirement that the ADOC "provide fully equipped law libraries at every prison unit with a capacity of 150 inmates," Pets.' Brief at 10. In fact, the injunction exempts five specific units from the law library requirement (*see* Pet. App. C at 61a) in order to avoid requiring defendants to build any new libraries. Commentary, Pet. App. C at 81a. (5) The procedure for determining where a prisoner may sit while using the law library, Pets.' Brief at 10. (6) The procedure for allowing prisoners to request the times at which they will use the law libraries, Pets.' Brief at 11. (7) The role of the special master, Pets.' Brief at 10-11. The duties of the master, and the documents that defendants are required to provide to him, are simply designed to allow him to monitor the defendants' implementation of the remedial order.

As a remedy for this violation, the district court adopted the following injunction:

A prisoner shall become a Legal Assistant by agreeing to abide by the procedures governing Legal Assistants, and by taking the legal research course. It shall not be necessary for prisoners to take the course prior to being approved as a Legal Assistant or beginning work. Such persons must have some legal research training, experience, or ability, and, after selection, must successfully complete the full course including the live component when first available. Applicants are eligible for the full course if (a) they have a high school or GED diploma, or (b) pass a basic literacy skills test to the satisfaction of the instructor, or (c) are presently on an institutional Legal Assistant list.

Pet. App. C at 70a. This narrowly tailored remedy imposes extremely basic and minimal eligibility requirements for legal assistants: literacy or a high school education. This standard simply ensures that the legal assistance program will amount to more than the "illiterate leading the illiterate." The injunction also shows ample deference to defendants by allowing them to retain all prisoners who are presently functioning as assistants, regardless of their qualifications.

2. Number of Legal Assistants

The district court found that the number of prisoners provided to assist illiterate or non-English speaking prisoners was inadequate. Pet. App. B at 44a. In making this finding, the district court relied on the parties' pretrial stipulation, which was supported by testimony and other evidence. See Pet. App. B at 28a, 28a n.64.

To remedy this violation, the district court adopted the following injunction: "ADOC must maintain a sufficient number of at least minimally trained prisoner Legal Assistants at each

facility." Pet. App. C at 70a. "ADOC shall act to insure an adequate minimum number of Legal Assistants for each institution and custody level; there is no maximum. Particular steps must be taken to locate and train bilingual prisoners to be Legal Assistants." Pet. App. C at 70a.

This remedy is narrowly tailored to the court's finding because it requires only that the ADOC maintain a "sufficient number" of assistants, and is thus similar to the requirement upheld in *Wolff v. McDonnell*, 418 U.S. at 579-80 ("At present only one inmate serves as legal adviser and it may be expected that other qualified inmates could be found for assistance if the Complex insists on naming the inmates from whom help may be sought"). Contrary to defendants' claims, the ADOC need not maintain an "optimal" number of legal assistants (see Pets.' Brief at 17); nor does the order specify the exact, or even approximate, number of assistants that must be provided. With regard to bilingual assistants, the injunction is even less demanding. It simply requires defendants to take steps to "locate and train bilingual prisoners," but does not require that defendants actually succeed in these efforts by providing an adequate number of bilingual assistants.

3. Training of Legal Assistants

The district court found, based on extensive trial testimony, that the legal assistants and law clerks are often insufficiently trained to provide prisoners with adequate legal assistance. Pet. App. B at 30a. Defendants stipulated that there was no Department of Corrections training program for prisoner law clerks, and no requirement that they have any legal training. Stipulation, J.A. 50.

In response to these findings, the district court adopted the following injunction: "ADOC must maintain a sufficient number of at least minimally trained prisoner Legal Assistants at each facility." Pet. App. C at 70a. "ADOC shall offer a videotaped legal research course for all prisoners, with an additional live component for prisoner law clerks, and Legal Assistants, and applicants.... The video will be 30-40 hours long with a primary

focus on the fundamentals of legal research and writing, including use of the books and materials available in the law libraries." Pet. App. C at 71a. "Shortly after viewing the taped course, prisoner law clerks and Legal Assistants, and applicants, shall be offered an additional twenty hours of live instruction.... The live portion shall include sessions in a facility law library, with written exercises required and returned with comments. Based on a student's performance in class and on assignments, the instructor shall determine whether the prisoner is minimally competent to assist others." Pet. App. C at 72a.

The requirement that assistants be "minimally trained" is narrowly tailored to ensure that they have basic competency to perform their function. Contrary to defendants' claim (Pets.' Brief at 17), the district court did not require that the assistants be "optimally" trained. The requirement of 30 hours of videotaped training and 20 hours of live instruction amounts to a minor imposition on prison authorities, given the complexity of the legal issues that the assistants will be required to address. Indeed, this regimen amounts to less than two weeks of training.

4. Competence of Legal Assistants

The district court found that the legal assistants available to illiterate and non-English speaking prisoners frequently lacked sufficient skills. Pet. App. B at 30a. It also found that there was no system in place to evaluate their work. Pet. App. B at 31a.

To address these problems, the district court adopted the following injunction: "A Legal Assistant must demonstrate at least minimal competence after one year, and thereafter upon the receipt of complaints about his or her legal work.... A determination by the instructor to remove a prisoner found not minimally competent from the Legal Assistant list must be made in writing with specific reasons and examples, and the relevant work products attached." Pet. App. C at 71a.

Again, this requirement that legal assistants be "minimally competent" to perform their function is a reasonable one.

5. Lockdown Prisoners

The district court's injunction includes the following language: "ADOC prisoners in all housing areas and custody levels shall be provided regular and comparable visits to the law library. This opportunity may be postponed on an individual basis because of the prisoner's documented inability to use the law library without creating a threat to safety or security, or a physical condition if determined by medical personnel to prevent library use." Pet. App. C at 61a. Defendants rely on this language to argue that the injunction requires them to grant all prisoners direct access to library stacks, unless they have documented a particular prisoner's inability to use the law library without creating a threat to safety or security. Pets.' Brief at 10; *see also id.* at 41-44.⁴⁸

Defendants' argument rests on a fundamental mischaracterization of the injunction. In fact, they won this point in the district court, and there is no case or controversy on this matter. If the Court believes that the injunction should be clarified, plaintiffs do not object to a remand for clarification of the order to provide explicitly that all prisoners in lockdown for disciplinary or security reasons can be barred from going to the law library, provided that they are provided with an effective, alternative means of access to the courts.

a. High Security Prisoners Housed at SMU and CB-6

To the extent that defendants' argument refers to prisoners housed at SMU and CB-6, the "high security" prisoners within the ADOC, the Commentary to the injunction specifies that defendants need not provide access to the law library shelves to these prisoners and need not engage in case-by-case documentation of

⁴⁸ It is unclear whether defendants' argument refers to high security prisoners (those housed at the SMU and CB-6 units at the Florence complex) or those prisoners in segregation for disciplinary or security reasons. *See* Pets.' Brief at 42 (referring to "high-risk inmates") and at 43 (referring to "segregated inmates"). Accordingly, plaintiffs address both categories below.

the risks they pose:

As was the case in *Gluth*, the [Proposed Order] permits use of a "check-out" system in maximum security facilities. It adopts Defendants' more practical position that this system can -- with the necessary showing -- be instituted prisonwide, and not only on the person-by-person basis proposed by Plaintiffs. At this time, a check-out system may be used at the Central Unit, CB6 and Special Management Unit facilities.

Pet. App. C at 83a.⁴⁹ This language permits defendants either to exclude high-security prisoners from the library or to continue their present policy of allowing them to visit the library but not to go directly to the shelves. See Pets.' Brief at 5.

b. Prisoners in Segregation for Disciplinary or Security Reasons

The injunction also does not prevent the ADOC from denying prisoners who are in lockdown for disciplinary or security reasons access to the law library; the language from the injunction that is quoted above simply does not apply to prisoners who are in segregation. Defendants knew that the injunction did not require them to provide lockdown prisoners with any greater access to the law library than they were already providing. In fact, the language in the injunction tracks, in identical language, the existing policy of the ADOC, which dates from 1991. DOC Policy on Inmate Access to Legal Assistance, Ex. 216 ¶ 6.22. This understanding of the terms of the injunction is made even clearer

⁴⁹ This Commentary was included in response to defendants' request for clarification on this issue. See Objections to the Special Master's Proposed Order, Aug. 13, 1993, J.A. 247 ("Obviously, for security concerns, inmates at SMU and CB6 cannot be allowed access to the stacks. Although defendants believe that the Special Master did not intend these facilities to be included, it is not clear").

by the fact that defendants did not object to this provision (§ I.A. of the Injunction) in any one of the five sets of objections filed over an eight-month period. Moreover, plaintiffs offer to prove, if this issue is remanded, that this language is also in the *Gluth* order and its uniform interpretation by the special master in *Gluth* has been that all prisoners in segregation for disciplinary or security reasons are, and can continue to be, barred from going to the law library.

The district court's order obviously contemplated that numerous prisoners would be denied physical access to a law library; it is for these prisoners (and illiterate and non-English speaking prisoners) that the district court ruled that the provision of legal assistance was necessary.⁵⁰ In so ruling, the district court deferred to defendants to determine how they would provide meaningful access to courts to lockdown prisoners: if defendants maintain their policy of denying law library access to lockdown prisoners, which they are free to do under the injunction, they must provide trained legal assistants to these prisoners as an alternative means of access to courts.

B. Other Provisions of the Injunction

1. Library Contents

Defendants challenge two requirements imposed by the district court with respect to library contents.⁵¹ First, defendants mention in passing that the injunction requires them to maintain

⁵⁰ "[I]f the state denies physical access to the law library, the state must provide that prisoner with legal assistance." Pet. App. B at 42a. The constitutional violation resulted, not because prison officials must grant direct access to a law library, but because the paging system alternative was inadequate to constitute access to a library (Pet. App. B at 42a), and "[u]ntrained prisoner legal assistants cannot provide constitutionally sufficient access to the courts for prisoners denied access to a law library." Pet. App. B at 43a.

⁵¹ The defendants claim that all ADOC law libraries contain all other required materials. Pets.' Brief at 3. This is contrary to the district court's findings and defendants' admissions in the court of appeals. See *supra*, n.19.

self-help manuals in the library collections. See *Pets.*' Brief at 40. However, it is unclear whether they wish to challenge this requirement, particularly because they offer no argument that it is improper. If the Court reaches this question, it should find that the district court properly imposed this requirement because such manuals are the only keys even literate prisoners will have to using the law libraries. These materials are necessary to make the contents of the law library of any use to prisoners able to undertake research on their own. The law library list in *Bounds* also included hornbook and general research aids. See 430 U.S. at 819 n.4.⁵²

Defendants also argue that the requirement that they "purchase a complete, up-to-date set of Pacific Reporters and digests for each law library" (*Pets.*' Brief at 10) is overbroad and should be reversed. *Pets.*' Brief at 39-40. The evidence at trial established that prisoners in the custody of the ADOC were subject to criminal proceedings in neighboring states. See R.T. 12/19/91 at 119-120. The district court's finding that Pacific Reporters and digests must be maintained for such prisoners is consistent with the rulings of other courts that meaningful access to the courts includes access to resource materials from other jurisdictions when a prisoner has a criminal conviction from that jurisdiction. See *Caldwell v. Miller*, 790 F.2d 589, 606-07 (7th Cir. 1986); *Sills v. Bureau of Prisons*, 761 F.2d 792, 796 (D.C. Cir. 1985); *Rich v.*

⁵² The *Bounds* list was based on the collection currently recommended by the American Correctional Association, American Bar Association, and the American Association of Law Libraries. See *id.* The collection currently recommended by the American Correctional Association still includes self-help litigation manuals as a basic material. See American Correctional Association, *Correctional Facility Law Libraries: An A to Z Resource Guide* at 3-4 (1991). Several lower courts have endorsed this list. See, e.g., *Ramos v. Lamm*, 639 F.2d 559, 584 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); see also *Abdul-Akbar v. Watson*, 4 F.3d 195, 203 (3d Cir. 1993) (referring to self-help manuals as one of the types of legal materials that would render a law library collection adequate).

Zitnay, 644 F.2d 41, 43 & n.1 (1st Cir. 1981).⁵³

Defendants suggest that this requirement goes beyond the collection required in *Bounds*, 430 U.S. at 819 n.4. *Pets.*' Brief at 40. In *Bounds*, however, the order for legal access required the prison officials to maintain a set of the relevant state reporters. In contrast, this injunction does not require defendants to maintain the Arizona Reporters (Pet. App. C at 69a), so the provision for Pacific Reporters serves as the functional equivalent of the requirement to maintain state reporters in *Bounds*.

2. The Qualifications for Librarians

Defendants seek the reversal of the requirement that the ADOC employ a full-time, professionally trained librarian for every library. *Pets.*' Brief at 39-41.⁵⁴ Contrary to defendants'

⁵³ The defendants argue that it is the responsibility of the other jurisdictions to provide regional reporters to Arizona prisoners. *Pets.*' Brief at 40 n.24 (citing *Boyd v. Wood*, 52 F.3d 820, 821 (9th Cir. 1995)). *Boyd* deals only with prisoners incarcerated pursuant to the Interstate Corrections Compact, under which the sending state retains responsibility for the transferred prisoner.

⁵⁴ The Court should not consider this objection to the injunction because defendants' objection to it was untimely, and the district court's order refusing to consider it was therefore well within its discretion. Defendants had repeated opportunities to raise the objection in four sets of objections filed over a six-month period (see Order Denying Plaintiffs' Motion to Dismiss Defendants' Objections, Sept. 27, 1993, J.A. 251-52), yet they raised it for the first time in their fifth set of objections (see Defendants' Objections to the Special Master's Proposed Order, Aug. 13, 1993, J.A. 246), which the district court had limited to objections that could not have been made earlier. Injunction, Pet. App. C at 58a. The defendants' response did not conform to the limitations imposed, and was based on conclusory allegations resolution of which would have substantially reopened the process of developing a remedy. Nonetheless, the defendants opposed a reopening of this process. Injunction, Pet. App. C at 58a. The district court appropriately held that the special master had the "discretion to disregard any objections or claims that were made for the first time in the final objections filed on August 13, 1993 and any objections that are not supported by evidence." District Court Order Denying Dismissal of Objections, Sept. 27, 1993, J.A. 253. Nonetheless, the district court noted that it "is willing to (continued...)

statement (Pets.' Brief at 10), the injunction does not require "each 'librarian' to possess a law degree or paralegal degree." Rather, the injunction requires that librarians have a law, paralegal, or library science degree. *See* Pet. App. C at 67a.⁵⁵ Also contrary to defendants' statement, the injunction does not require them to hire a librarian "for every library." Pets.' Brief at 40.⁵⁶

The district court found that many of the law libraries are not staffed by librarians, that "ADOC recognizes a need for additional librarians, but requests for additional staff have been rejected," and that "[t]here is a specific need for more library staff to assist in providing library services to prisoners in lockdown at the Perryville facility." Pet. App. B at 28a-29a. Although some librarians have training in library science, this is not a requirement. Also, staff is not required to have training in legal research." Pet. App. B at 32a. The librarians (along with prisoner legal assistants and law clerks) are "responsible for providing legal services to all prisoners in the facilities." Pet. App. C at 28a.

These findings support the requirement for professionally trained librarians. As the district court recognized, it stands to

⁵⁴(...continued)

ma[k]e changes to accommodate the defendants if good reasons exist for making the changes." District Court Order Denying Dismissal of Objections, Sept. 27, 1993, J.A. 252. The Court should leave this issue for resolution during implementation of the injunction.

⁵⁵ Paralegals were added to the list of persons eligible to serve as librarians in order to expand the pool of applicants, because the district court anticipated that paralegals would be more readily available than persons with a degree in library science. Pet. App. C. at 59a. The injunction also requires defendants to attempt to hire, as one of the librarians for each prison complex of several institutions, a librarian with a law or paralegal degree, but the injunction contemplates that if persons with this training are not available, staff with librarian training may be hired. Pet. App. C at 67a. The commentary notes that hiring staff with legal or paralegal training would reduce the total costs to defendants because these staff could teach the required research courses and monitor the work of the legal assistants. Pet. App. C at 82a-83a.

⁵⁶ A librarian may be assigned to cover a second facility if the population of that facility is less than 200. Pet. App. C at 66a-67a.

reason that in order to provide prisoners with adequate law library services, a librarian must be minimally trained to provide those services. Pet. App. B at 32a.

3. Library Hours

Defendants argue that this portion of the injunction should be reversed, characterizing it as a requirement that the ADOC "open all ADOC law libraries between 50 and 80 hours per week, including night and weekend hours, regardless of demand." Pets.' Brief at 10; *see also id.* at 41. Defendants' characterization is wrong. Defendants are initially required to provide a minimum of fifty hours per week during which the law libraries are open, with greater hours according to population if the facility requires prisoners to request access in advance. Pet. App. C. at 62a. However, the district court recognized in the order that low actual usage rates for particular law libraries would justify further reductions in the scheduled hours. The injunction specifically contemplates that when information about actual usage rates is available, the library hours will be further adjusted in light of below-average usage rates. *See* Pet. App. C at 64a. Thus, contrary to defendants' statement (Pets.' Brief at 10), the district court never contemplated that these hours would be maintained "regardless of demand."

Defendants contend that the district court failed to make any findings regarding the adequacy of the hours of operation of the law library. Pets.' Brief at 10, 41. In fact, the court specifically found that, at the time the case was filed, prisoners had insufficient time in the law libraries (Pet. App. B. at 41a), a finding adopted by the court of appeals. Pet. App. A at 15a.⁵⁷ While the litigation was pending, defendants increased the hours of operation of the law libraries. *Id.* Because of the history of a constitutional violation, however, the district court was entitled to prevent defendants from reverting to the earlier unconstitutional

⁵⁷ The defendants have never challenged the district court's finding that the previous hours of operation were constitutionally inadequate.

policies. This Court has consistently held that reforms made under pressure of litigation neither moot a controversy nor bar injunctive relief. See, e.g., *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982); *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

4. Access to Telephone Calls to Counsel

The district court ordered defendants to "provide a weekly minimum of three 20-minute telephone calls to an attorney, an attorney representative, or legal organization." Pet. App. C at 76a. Defendants argue that this aspect of the remedy should be reversed as overbroad, and that the primary means of attorney-client communication should be written correspondence. Pets.' Brief at 10, 46-47.

The district court found that defendants themselves conceded that prisoners sometimes need telephone contact with attorneys (Pet. App. B at 39a), and that the ADOC's telephone policy "significantly diminishes the ability of prisoners to have access to the courts because they are unable to have confidential attorney-client calls." Pet. App. B at 40a. This Court has held that "[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (striking down regulation that barred use of law students and paraprofessionals for prisoner interviews).⁵⁸

The defendants' attorney telephone call policy fails to satisfy the test established in *Procunier*. It obstructs access because prisoners must make disclosures to staff that are

⁵⁸ The defendants' constitutional responsibility to avoid creating unnecessary barriers to access to lawyers is independent of their affirmative obligation to provide all prisoners with access to the courts. See *Bounds v. Smith*, 430 U.S. at 824 n.11 (noting that *Procunier* had struck down the regulation limiting access to paraprofessionals even though California provided adequate law libraries and permitted prisoner legal assistance).

inconsistent with attorney-client confidentiality.⁵⁹ The policies are unreasonable and irrational because they vary from prison to prison, and the decision to grant or deny a telephone call is made on the basis of factors unrelated to the prisoner's need.⁶⁰ Furthermore, the uncontroverted evidence at trial established that the telephone policy has resulted in harm.⁶¹

Numerous courts of appeals have recognized that telephone calls with a prisoner's lawyer fall within the right of access to courts set forth in *Bounds*. In *Johnson by Johnson v. Brelje*, 701 F.2d 1201, 1208 n.8 (7th Cir. 1983), the Seventh Circuit upheld a district court order that required that prisoners be given a reasonable opportunity to telephone attorneys. Citing this Court's ruling in *Procunier*, the court in *Brelje* held that the prison's telephone regulation was an unjustifiable restriction on the right of prisoners to receive the assistance of attorneys. *Id.* at 1207.⁶²

The injunction adopted by the district court provides that telephone calls are to be placed collect to counsel or a legal

⁵⁹ Prisoners are required to substantiate a need for telephone communications that cannot be met by mail or attorney visitation, and requests are denied by staff when such a need is not demonstrated to their satisfaction. Pet. App. B at 37a-38a. Furthermore, at some facilities, the prisoner must tell staff the exact nature of the call before the confidential attorney-client call is granted. Pet. App. B at 39a-40a.

⁶⁰ See Pet. App. B at 37a-40a.

⁶¹ See, e.g., Tr. 12/19/91 at 100-109 (Coley) (prisoner indicates he missed court deadline because of delay in telephone call to lawyer and that staff are always in room during attorney client calls; nothing in cross examination challenges these statements). Thus, defendants are incorrect that the district court "did not find that the ADOC's current policy denies inmates reasonable contact with existing or potential attorneys, much less that any inmate has suffered an actual injury to his due process or equal protection rights." Pets.' Brief at 46.

⁶² See also *Tucker v. Randall*, 948 F.2d 388, 391 (7th Cir. 1991); *Divers v. Department of Corrections*, 921 F.2d 191, 194 (8th Cir. 1990); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051-52 (8th Cir. 1989); *Montana v. Commissioner's Court*, 659 F.2d 19 (5th Cir. 1981), cert. denied, 455 U.S. 1026 (1982); *Gillespie v. Civiletti*, 629 F.2d 637 (9th Cir. 1980).

organization, or must be paid for by the prisoner.⁶³ These limitations ensure that the effect of the provision challenged by defendants will be limited to those circumstances in which a prisoner has a real need to speak with counsel.

5. Photocopying

The district court found that "ADOC's photocopy policy does not ensure that the substance of prisoners' confidential legal materials are not read by other prisoners or staff." Pet. App. B at 36a-37a. There was testimony, credited by the district court, that people had been observed reading documents during the photocopying process. See Tr. 12/17/91 at 152 (Bishop).

The sole relief granted by the district court on this issue was a requirement that the Department of Corrections advise the staff "that prisoner legal materials are confidential and may not be read" and post a sign to this effect on copying machines. Injunction, Pet. App. C at 77a. Defendants argue that this requirement should be reversed. Pets.' Brief at 47. They further argue that "Respondents never contended that the manner in which legal materials were photocopied deprived any inmate of his right of access to the court." *Id.*

This Court has long recognized the importance of confidentiality in the attorney-client relationship. See *Upjohn Co. v. United States*, 449 U.S. 383, 389-91 (1981). Courts of appeals have consistently found that protection of the confidences that arise in a prisoner-counsel relationship is of fundamental importance.⁶⁴ Indeed, the importance of confidentiality of communications is

⁶³ This limitation was requested by defendants (see Defendants' Objections to the Special Master's Proposed Order, Aug. 13, 1993, J.A. 249), and was incorporated into the injunction. See Pet. App. C at 76a.

⁶⁴ See, e.g., *Bieregu v. Reno*, 59 F.3d 1445, 1455 (3d Cir. 1995); *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1052-53 (8th Cir. 1989); *Bach v. The People of the State of Illinois*, 504 F.2d 1100, 1102 (7th Cir.), cert. denied sub nom. *Bensinger v. Bach*, 418 U.S. 910 (1974); *Adams v. Carlson*, 488 F.2d 619, 630-32 (7th Cir. 1973); *Goodwin v. Oswald*, 462 F.2d 1237, 1241 (2d Cir. 1972).

particularly heightened in the prison setting because of the potential for staff interference, harassment and retaliation, an "injury" that was shown at trial to be a reality.⁶⁵

Principles of confidentiality do not protect only communications between attorney and client, but extend to legal materials generally. See *Muhammad v. Pitcher*, 35 F.3d 1081, 1083-84 (6th Cir. 1994) (finding that principles of confidentiality apply to letters from Attorney General to prisoner), and cases cited therein, *id.* at 1083. Letters from opposing counsel, elected officials, and government agencies, as well as court filings, create the same potential for retaliation by staff, particularly because a substantial portion of the litigation filed by prisoners involves conditions of confinement challenges, including challenges to particular actions by staff.

Defendants' argument may be that a showing of staff retaliation is not a sufficient showing of injury, but that a showing of an actual denial of access to courts is required. However, our legal system protects attorney-client confidences in order to avoid a "chilling effect" that prevents individuals from seeking the assistance of counsel. It is designed to "facilitate[] the full development of facts essential to proper representation of the client [and to] encourage[] laymen to seek early legal assistance." *Upjohn Co. v. United States*, 449 U.S. 383, 389-91 (1981) (quoting Model Code of Professional Responsibility EC 4-1). If a prisoner knows that the right to confidential communications with her attorney is protected only if a confidence is first violated, and is violated in such a way that actually prevents her from gaining access to a court, the right of confidentiality would have been effectively eviscerated, and the chilling effect that the

⁶⁵ Stephen Bishop, a prisoner legal assistant, testified that he had filed a civil rights case on behalf of Nathan Daley, another prisoner. This lawsuit alleged that a correctional officer had assaulted Mr. Daley. Following Mr. Bishop's assistance in the case, the defendant in Mr. Daley's lawsuit started harassing Mr. Bishop, telling him that "what goes around comes around." Tr. 12/17/91 at 110, 138-139 (Bishop). The defendants offered no rebuttal to this testimony.

protection is designed to prevent would necessarily occur.⁶⁶

The defendants have no legitimate interest in reading prisoners' legal materials.⁶⁷ Because the district court found that reading had occurred in the past, this innocuous aspect of the injunction was well within its discretion.⁶⁸

CONCLUSION

For the above reasons, plaintiffs urge this Court to affirm the decision of the court of appeals.

⁶⁶ For this reason, in *Muhammad v. Pitcher*, 35 F.3d 1081, 1083-84 (6th Cir. 1994), the court found that the "chilling effect" caused by opening legal mail constitutes sufficient "injury."

⁶⁷ Defendants have never claimed that staff have a right to read these documents.

⁶⁸ Defendants note that "the injunction goes so far as to set forth the amount per page Petitioners can charge inmates for copies." Pets.' Brief at 47. The Ninth Circuit vacated and remanded this portion of the order. Pet. App. A at 17a.

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Supreme Court of the United States

OCTOBER TERM, 1995

SAMUEL LEWIS, *et al.*,
v. *Petitioners,*

FLETCHER CASEY, JR., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

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I. INTRODUCTION.

Respondents fail to address the constitutional foundations of the right of access to the courts: the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Instead, Respondents focus almost entirely on their own expansive misreading of *Bounds v. Smith*, sidestep this Court's decision in *Turner v. Safely*, which grants deference to prison officials' policies, and fail to discuss this Court's recent reaffirmation in *Missouri v. Jenkins* that structural injunctions must be tailored to remedy only constitutional violations.

Respondents' position is that the Constitution requires that States provide inmates *better* access to courts than they provide to unincarcerated, law-abiding citizens. For example, Respondents claim that illiterate and non-English speaking prisoners have a constitutional right to state-provided legal assistants—a resource plainly not available to illiterate and non-English speaking individuals who have not been convicted of crimes. *See* Resp. Br. at 13-16. Yet nothing in the Constitution supports Respondents' attempt to elevate inmates' rights above those of law-abiding citizens.

As Petitioners demonstrated, this Court's decisions construing the Fourteenth Amendment require only that States (1) not impose arbitrary barriers to prisoners' access, and (2) provide the basic resources and materials necessary for prisoners to have a "reasonably adequate" opportunity to present their civil claims in court, in light of the necessary deference to the States' penological objectives. Arizona more than satisfies these minimum standards. Respondents have never contended that Arizona imposes any arbitrary barriers to access, and the State's comprehensive court access system provides prisoners with at least a "reasonably adequate" opportunity to bring civil and post-conviction claims, a fact made plain by the paucity of proof of actual injury attributable to Petitioners' system.

Respondents' attempt to portray the district court's sweeping, systemwide injunction as consistent with traditional equitable principles and properly deferential to the State's legitimate penological interests is unpersuasive. No systemwide violation exists that justifies placing the Arizona prison system for providing court access under federal judicial supervision for the indefinite future. Even with respect to particular elements of the injunction, the findings do not justify the particular remedies that were ordered.¹

¹ Before turning to the real issues in this case, Petitioners note that Respondents attempt to engender factual debates and spend much of their brief arguing about what the record shows. To erase any confusion, Petitioners do not here challenge the district court's purely factual findings as clearly erroneous. See *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985).

However, the district court's findings supporting individual components of the injunction—for example, that legal assistants are not sufficiently skilled to provide inmates with "adequate assistance," see Pet. for Cert. App. at 30a, or that the number of legal assistants is "inadequate," *id.* at 44a—are mixed findings of fact and law that are based on an erroneous view of what the Constitution requires. The district court based its findings not on any demonstration of constitutional injury to the inmates, but upon its personal notion that the prison policies were "inadequate" when measured against its beliefs as to how best to run the prisons' access system. These determinations are subject to *de novo* review. See *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961) (legal determinations, even those disguised as factual decisions, are reviewed *de novo*); *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982) (mixed questions of law and fact are reviewed *de novo*).

As this Court has noted, questions concerning the scope of a State's obligation to provide inmates access to courts should not be restricted by the "'factual' findings of a particular district court regarding matters such as the perceived difficulty of capital sentencing law and the general psychology of . . . inmates." *Murray v. Giarratano*, 492 U.S. 1, 12 (1989). Such a standard would allow "a different constitutional rule to apply in a different State if the district judge hearing that claim reached different conclusions." *Id.*

II. ARIZONA SATISFIES ITS CONSTITUTIONAL OBLIGATION TO PROVIDE INMATES ACCESS TO THE COURTS THROUGH THE PROVISION OF ADEQUATE LAW LIBRARIES.

In contrast to the Respondents, who propose a sweeping expansion of the obligations imposed upon States to assist inmates in their legal pursuits, Petitioners seek no more than the reaffirmance of this Court's previous holdings in *Bounds v. Smith*, 430 U.S. 817 (1977), and *Turner v. Safely*, 482 U.S. 78 (1987), which together provide a simple two-step analysis for adjudicating inmate "access to court" cases.

The first step asks whether the State provides an inmate adequate resources to overcome the impediments inherent in the fact of incarceration that have been shown to cause an inmate's inability to file a *habeas corpus* petition or civil rights complaint. *Bounds* establishes that due process and equal protection principles require States to compensate for the unique obstacles caused by incarceration, and holds that States satisfy this affirmative obligation by supplying indigent inmates basic supplies such as pens, paper, stamps, and notarial services, 430 U.S. at 824-25, and by providing "adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828 (emphasis added).

The second step in the analysis applies if an inmate's proven inability to proceed with litigation is not caused by a deficiency in the resources that a State provides, but from an institutional restriction upon the inmate's ability to use the resources provided. At this point, courts should employ the four-part test established by *Turner*, which applies to regulations that impinge on an inmate's constitutional rights. 482 U.S. at 89. Under *Turner*, a prison regulation that actually restricts access must be upheld "if it is reasonably related to legitimate penological interests." *Id.*

A. *Bounds* Requires Either Adequate Libraries or Legal Assistance by Those Trained in the Law, But Not Both.

Respondents' position that Arizona is constitutionally compelled to provide more than an adequate library—particularly for illiterate inmates and those in lock-down facilities—has no basis in the Constitution or in this Court's decisions. The text of the Constitution does not create a right to engage in civil litigation, and the right of "access" is not "fundamental," and therefore does not warrant heightened scrutiny for inmates or other *pro se* litigants.

Respondents' argument that *Bounds* does not allow prison administrators to choose to supply *either* adequate law libraries *or* legal assistance from persons trained in the law ignores the carefully chosen words the Court adopted, and repeated several times. See *Bounds*, 430 U.S. at 817 ("[t]he issue in this case is whether States must protect the right of prisoners to access to the courts by providing them with law libraries *or* alternate sources of legal knowledge"); at 820 (affirming court of appeals' affirmance of district court's holding "that petitioners were *not* constitutionally required to provide legal assistance as well as libraries"); at 825 ("[t]he inquiry is rather whether law libraries *or* other forms of legal assistance are needed"); at 828 n.16 ("[w]ithout a library *or* legal assistance," inmates will lose the chance to present claims); *id.* (holding that the right of access to the courts requires "providing prisoners with adequate law libraries *or* adequate assistance from persons trained in the law"); at 828-29 (stating that the holding reaffirms *Gilmore*, which presented the substantive question whether States "have an affirmative duty to furnish prison inmates with extensive law libraries, *or*, *alternatively*, to provide inmates with professional or quasi-professional legal assistance"); at 829 (prison officials "have made impressive efforts to fulfill *Gilmore's* mandate by establishing law libraries, prison legal assistance programs, *or* combinations of both"); at 830 ("adequate law libraries are *one* constitutionally acceptable method

to assure meaningful access to the courts") (citations omitted and emphasis added throughout). The simple and clear words of *Bounds* have guided the nation's prison systems for eighteen years² and require reversal of the decision below.

Respondents attempt to bolster their position that illiterate inmates are entitled to special assistance by asserting that, notwithstanding the clear language quoted above, *Bounds* "recognized that the mere provision of an adequate law library does not satisfy the obligation to provide access to the courts for illiterate prisoners." Resp. Br. at 16. But Respondents point to no language or analysis in *Bounds* that supports this assertion. In fact, the *Bounds* majority did not discuss the States' obligations to illiterate inmates, except to recognize its prior decisions holding that prisons may not arbitrarily preclude inmates from assisting one another.

Furthermore, Respondents incorrectly argue that it was "critical" to the Court's analysis that *Bounds* "involved prisoners able to use a law library without assistance." Resp. Br. at 15. This assertion finds no support in *Bounds*. Indeed, the decision in *Bounds* arose from three consolidated cases involving all inmates incarcerated in North Carolina prisons, literate and illiterate.³ Like this

² Respondents incorrectly claim that none of the circuit courts have relied upon the disjunctive reading of *Bounds*. See Resp. Br. at n.24. To the contrary, see Pet. Br. at 33-34. See also *Blake v. Berman*, 877 F.2d 145, 146 (1st Cir. 1989). Even the Ninth Circuit Court of Appeals, from which this case arises, rejected an argument similar to that raised here, finding it "impossible to ignore the Supreme Court's explicit holding in *Bounds* that 'adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts.'" *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 855 (9th Cir. 1985) (quoting *Bounds*, 430 U.S. at 830).

³ The Court specifically noted that the *Bounds* inmates had sought the establishment of a library at every prison and additional legal advisors. *Bounds*, 430 U.S. at 820. The lower courts had rejected the argument that both libraries and legal assistance were necessary, and found that the prisons' plan to supply libraries alone, with some inmate clerks, was sufficient to provide reasonable

case, *Bounds* was a system-wide challenge to North Carolina's legal access program, and the Court no doubt was aware that illiteracy and language barriers were commonplace in prison.⁴

It is unfortunate that some individuals, both inmates and non-inmates, are unable to easily access the court system because of their illiteracy or inability to read English. However, Respondents incorrectly argue that States have an affirmative duty to cure these deficiencies that parallels the States' duty under the Eighth Amendment and Due Process Clause to provide for inmates' basic needs and safety. Resp. Br. at 18. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1989), upon which the Respondents rely, merely recognized that States have an affirmative obligation to provide food, clothing, medical care, and other basic needs because of "the limitation which [States have] imposed" on inmates ability to take care of themselves. *Id.* The affirmative duties proposed by Respondents are not "parallel" because the limitations on illiterate and non-English speaking inmates' ability to conduct civil litigation are not imposed by the State.

To hold that prisons must supply both law libraries and legal assistance by those trained in the law, as the lower courts held and the Respondents urge here, is to take the federal courts so far down the "slippery slope" foreseen by then-Justice Rehnquist, that the distinction between prison management and constitutional adjudica-

access. *Id.* at 820-21; see also *Smith v. Bounds*, 538 F.2d 541 (4th Cir. 1975).

⁴ Respondents also assert that *Wolf v. McDonnell*, 418 U.S. 539 (1974), and *Johnson v. Avery*, 393 U.S. 483 (1969), stand for the proposition that States have an affirmative duty to ensure "meaningful access" for illiterate inmates by providing them with legal assistants in addition to law libraries. Resp. Br. at 13. These decisions, however, did not address that issue, either expressly or implicitly, and certainly did not establish any affirmative obligations on States. These cases stand for the narrow and unremarkable position that a prison may not arbitrarily eliminate a significant source of assistance to inmates.

tion is lost. See *Bounds*, 430 U.S. at 837 (Rehnquist J., dissenting). The myriad goods and services that the federal courts could require of States is limited only by the perceived impediments to legal access with which inmates enter prison, and by fertile imaginations.

Should this Court adopt Respondents' position and affirm the district court's detailed injunction, there can be no solid constitutional footing upon which prison administrators may stand in deciding how much is constitutionally required, because the grounding of "meaningful" access will necessarily shift from prison experts to district courts, and the constitutional standard for adequacy will differ from district to district. This untenable result is unwarranted by a fair reading of *Bounds*' clear "either/or" mandate. The decision to require both law libraries and legal assistance should be reversed.

B. Arizona Supplies More Than Adequate Library Services to Inmates, and Fulfills Its Obligation Under *Bounds*.

Under any reading of the record in this case, Arizona has met its constitutional obligation to provide inmates with adequate law libraries. At the time of trial Arizona had nine prison complexes, yet it had 26 libraries,⁵ each stocked with more than enough research materials for an inmate to research a *habeas corpus* petition, or civil rights complaint. The district court itself found that "[g]enerally, the facilities appear to have complete libraries." Pet. for Cert. App. at 46a. There is no serious dispute that the available legal resource materials are sufficient to allow inmates to prepare pleadings that satisfy the notice pleading requirements.⁶

⁵ By contrast, the North Carolina inmate library plan that this Court approved in *Bounds* proposed only seven libraries to accommodate approximately 80 prison units throughout the State. See *Smith*, 538 F.2d at 542.

⁶ Respondents contend that *Bounds* "rejected" Arizona's argument that the States' affirmative obligations with respect to court access should be evaluated in light of the liberal pleading standards that pro se pleadings must satisfy. Resp. Br. at 21. However,

Additionally, Respondents do not claim that Arizona restricts inmates from assisting one another in their legal endeavors. To the contrary, although not required to do so under the clear mandate of *Bounds*, at each library the State provides inmate law clerks, who help inmates retrieve the books they need. Inmates who want to volunteer as legal assistants are also available in each unit to help inmates perform research and draft pleadings. Together with the resources available from legal assistance groups outside the prison,⁷ Arizona's inmates receive much more than is required by *Bounds*.

Indeed, Arizona's legal access plan is remarkably similar to the Federal Bureau of Prisons (BOP) legal access plan, which the United States contends is an effective model for providing "meaningful access to all categories of BOP inmates. . . ." United States Amicus Br. at 24. Like the Arizona plan, the BOP plan essentially uses a paging system to provide access for lockdown in-

Bounds did not reject this idea; it merely reasoned that adequate law libraries or assistance from persons trained in the law are nonetheless constitutionally required, even with the liberal pleading requirements, a proposition that Arizona does not dispute. In turn, Respondents do not dispute that inmates engaged in *pro se* litigation need only plead the facts supporting their claims with little, if any, legal analysis or authority.

Ironically, the recent inmate rights cases that Respondents cite to illustrate the importance of *pro se* litigation, Resp. Br. at 11, dramatically demonstrate this point. The original complaints in *Sandin v. Conner*, 115 S. Ct. 2293 (1995), *Helling v. McKinney*, 113 S. Ct. 2475 (1993), and *Hudson v. McMillian*, 503 U.S. 1 (1992), contain no legal analysis or case citations at all. Instead, the complaints were submitted on court-provided forms that asked the inmates to provide the facts and other information relating to their claims, but did not request any legal analysis. Indeed, the forms in *Hudson* and *Sandin* explicitly instructed that legal analysis and case citations should *not* be provided.

⁷ The fact that Respondents in this case obtained representation from the ACLU National Prison Project for their class action demonstrates this point. In addition, the record reflects that Arizona inmates are assisted by outside organizations such as the Arizona Capital Representation Project and student legal services projects provided by Arizona State University. Jt. App. at 80-82.

mates, *id.* at 25, and absent special security concerns, the BOP does not prohibit inmates from assisting each other in performing research and preparing legal documents. *Id.* at 26. Moreover, like Arizona, the BOP does not provide formal training for law clerks or legal assistants.⁸ Further, like Arizona, BOP serves illiterate and non-English speaking inmates' access needs primarily through assistance by other inmates and referral to "resources that may be available in the community." *Id.* at 27. Petitioners agree that the BOP system constitutes an "effective method of accommodating inmates' interests," *id.* at 24, as does Arizona's virtually identical system.

C. Any State-Imposed Restrictions on Inmate Access to Library Services Are Related to Legitimate Penological Interests and Are Constitutional Under *Turner*.

Respondents concede that this Court's analysis in *Turner v. Safely*, 482 U.S. 78 (1987), applies to "particular prison rules regulating access" to a prison's legal resources.⁹ Resp. Br. at 19 n.29. Having made this concession, however, Respondents do not analyze Arizona's restrictions on inmate access under the *Turner* standard. Instead, Respondents use *Bounds* to argue that Arizona's denial of access to the stacks in some high security institutions, and its replacement of access to the library with a paging system for inmates in lockdown for disciplinary reasons, denies "meaningful access to the courts for those affected inmates." Resp. Br. at 22-25. Because Respondents disregard *Turner*, their analysis is fundamentally flawed.

⁸ BOP has a limited pilot program to train law clerks. *Id.* at 26 n.18. Even in the pilot program, the BOP "trains" the law clerks by requiring them to read self-help manuals and pass a written examination. *Id.*

⁹ Of course, *Turner* is relevant only if the Court finds that there has been an actual infringement of the inmates' due process or equal protection rights. For reasons discussed *infra*, Respondents have failed to demonstrate any actual constitutional injury caused by Arizona's system of providing access to the courts.

Respondents forget that this case is about prisons, where life is often inconvenient, and the only resource in true abundance is time. Their argument assumes that legal access requires that inmates must have all available library resources at their fingertips, without any substantial inconvenience, delay, or difficulty. Respondents argue that no regulation that limits an inmate's right to easily use the library resources available can survive the "meaningful access" test of *Bounds*.

However, in *Turner* this Court squarely rejected the notion that prisons may not impinge upon inmates' constitutional rights when justified by penological concerns. For example, this Court found that even the otherwise fundamental right to exercise a sacred religious practice may not only be impinged, but flatly barred because orderly prison administration could not accommodate it. *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (cf. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb to -4 (1993)); see also *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (prison regulation giving officials broad discretion to limit incoming publications is constitutional under *Turner*). Respondents' suggestion that inmates have a right to access Arizona's library resources, unencumbered by the needs of prison security and orderly administration, is meritless.

Arizona imposes reasonable restrictions on certain inmates' access to the stacks or the libraries themselves. As discussed in Petitioners' Opening Brief, however, these restrictions satisfy the *Turner* test and are entitled to deference (Pet. Br. at 42-44). The adequacy of the access system for these inmates is demonstrated by Respondents' inability at trial to produce even one inmate subject to these restrictions who could testify that he had not been able to file a federal *habeas corpus* petition or civil rights complaint.¹⁰

¹⁰ Also, Arizona's system is again remarkably similar to the BOP system, in which high security inmates are denied access to the main libraries, and must request materials in writing. United States Amicus Br. at 25. At the BOP, it takes "a few

III. RESPONDENTS FAILED TO DEMONSTRATE "ACTUAL INJURY" RESULTING FROM THE STATE'S SYSTEM OF PROVIDING ACCESS TO THE COURTS.

Respondents fail to address Arizona's argument that 42 U.S.C. § 1983 and traditional equitable principles require that an actual injury be shown before relief can issue. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (Equitable relief is unavailable absent a showing of irreparable injury.). Respondents claim that injunctive relief should be available on a mere showing of potential injury. Resp. Br. at 27-28.

To support their "potential injury" theory, Respondents cite two Eighth Amendment cases. See *id.* While the potential harm standard is appropriate for Eighth Amendment claims involving a substantial risk of serious injury to the health or safety of inmates or allegations of unsafe or life-threatening conditions, the standard should not be expanded beyond the health and safety arena to protect rights not fundamental under the Equal Protection and Due Process Clauses.

If relief were available based only on a showing of "potential" injury, federal courts would have virtually unfettered license to exercise their remedial authority. It is always possible for States to do more for anyone, including inmates. Thus, guided only by a potential injury standard, federal judges could design systems that fulfill their own notions of court access, divorced from any Fourteenth Amendment foundation and without regard for the principles of separation of powers and federalism.¹¹

working days" for these requests to be filled, "although the volume of inmate demands in light of staffing resources may lengthen the time in particular cases." *Id.*

¹¹ The far-reaching implications of this theory are evident in this case by the district court's finding that regional reporters and digests are required in Arizona's libraries because it "appears that [they] may be necessary for the inmates to pursue their cases." Pet. for Cert. App. at 46a (emphasis added).

In this case, after a three-month trial, Respondents showed only two isolated instances of actual injury to two illiterate inmates. Pet. for Cert. App. at 25a. They demonstrated no systemwide violation. See *Lyons*, 461 U.S. at 105-06. These two injuries are not constitutionally cognizable injuries that would support a systemwide remedy. Significantly, there were no findings of actual injury to non-English speaking inmates, no findings of actual injury to inmates who do not have access to the stacks, and no findings of actual injury to inmates in lockdown who obtain library resources through the paging system. In short, Respondents failed to demonstrate any injury that would support relief under § 1983 and none that would support systemwide relief.

On these findings, the "severe interference" with court access alleged by Respondents reduces at most to a matter of inconvenience to inmates. Mere inconvenience, however, is not a constitutional injury that can support a finding that Arizona's entire legal access system is constitutionally deficient.

In response to the State's showing that there were no constitutional violations that caused actual systemic injury, Respondents raise the technical defense that the injury issue was not raised below and is not encompassed within the issue presented for review by this Court. Resp. Br. at 25-26. Both contentions are belied by the record.

First, Petitioners argued below that Respondents failed to show that the alleged deficiencies in Arizona's legal access program caused inmates to lose cases or to forgo the filing of claims. See Pet. for Cert. at 8 n.6. That the Ninth Circuit declined to address the issue, see Pet. for Cert. App. at 6a n.3, does not indicate a waiver of the issue by Petitioners.

Second, the issue of injury is fairly comprised within the issue presented for review¹² and was advanced in the

¹² Whether inmates must show some actual interference with court access to succeed in proving a legal access challenge is at a

Petition for Certiorari as one of the reasons the Court should review this case. Pet. for Cert. at 8. Respondents' attempt to deflect this Court from considering this important issue should be rejected.¹³

IV. BECAUSE THE INJUNCTION VIOLATES THIS COURT'S TEST FOR INJUNCTIVE RELIEF, IT EXCEEDS THE DISTRICT COURT'S AUTHORITY AND CANNOT STAND.

Respondents assert that two isolated, anecdotal incidents of alleged injury justify the systemwide structural injunction in this case. Federal court intervention into state operations, however, should be no more intrusive than is necessary to protect constitutional rights. *Missouri v. Jenkins*, 115 S. Ct. 2038, 2049 (1995). From this established proposition, it follows that federal decrees governing state operations must be narrowly tailored so that they do not intrude into the exercise of authority properly delegated to state officials. See *id.* Equity decrees are not "palliatives for societal ills." *Jenkins*, 115 S. Ct. at 2061 (O'Connor, J., concurring).

minimum an issue subsidiary to the inquiries that are squarely before this Court: whether the right to legal "access" requires both law libraries and legal assistance, and whether the district court's injunction exceeded the permissible scope of the court's remedial authority. See *Missouri v. Jenkins*, 115 S. Ct. 2038, 2047 (1995) (discussing standards for determining when an issue is "fairly comprised" within the question presented or necessary for its determination).

¹³ Even if some doubt exists as to whether the injury question is properly raised, this Court should nevertheless address it. The question was raised in the circuit court below, is of significant nationwide importance, and has been fully briefed. See *Yee v. City of Escondido, Cal.*, 503 U.S. 519 (1992) (rule that Court will not consider claims not properly raised is prudential, not jurisdictional); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) (Court will consider non-jurisdictional question not raised below or contained in the petition if it is of significant importance, and has been fully briefed and argued).

This Court has consistently applied a three-part test to ensure that structural orders are so limited. *Id.* at 2049; *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977). That test requires that (1) the "remedy must be related to 'the condition alleged to offend the Constitution,'" (2) the decree must be narrowly tailored and *remedial* in nature, and (3) the federal courts must take into account the interests of state authorities in managing their own affairs. *Id.* Although Respondents cited *Milliken*, they did not analyze its application to the injunction at issue here. Moreover, Respondents neither cite nor discuss *Missouri v. Jenkins*, this Court's recent case discussing the scope of structural injunctions. Had they done so, the injunction's overbreadth would have been obvious.

A. The Injunction Imposes "Remedies" Where There Were No Violations, in Disregard of This Court's Mandates.

The first prong of this Court's test requires that equitable decrees must attempt to remedy specific constitutional violations. *See id.* As demonstrated in Section III, Respondents failed to show that the inmates, either as a whole or in particular groups, were actually injured as a result of the State's access program. The two isolated, anecdotal incidents of alleged injury in the record do not demonstrate a systemwide constitutional injury and therefore do not justify the district court's micromanagement of the Arizona prison program. The injunction as a whole, therefore, should fall.

In addition, several individual terms of the injunction at issue can be tied to no constitutional violation. For example, Respondents did not and cannot tie the district court's strict requirements on the training of legal assistants in such fields as torts, domestic relations, and immigration law to any constitutional right for inmates to have legal assistance in these areas of the law. *See Pet. for Cert. App. at 69a-74a; Resp. Br. at 37-38.* These subjects cannot possibly be necessary for the as-

sistants to help inmates in filing *habeas corpus* or civil rights cases. Nor do Respondents attempt to defend injunction terms such as the one requiring Arizona to reduce noise levels in the libraries and to install certain types of reading rooms in each of its 26 prison libraries, *see Pet. for Cert. App. at 68a*, even though the inmates never alleged or proved, and the judge never found, that there was excessive noise in the libraries or reading rooms at any one of the 26 libraries, much less at all of them.¹⁴

Injunction terms not tied to specific constitutional violations have the "sole effect" of "grant[ing] future offenders against prison discipline greater benefits than the Constitution requires." *Hutto v. Finney*, 437 U.S. 678, 712 (1978) (Rehnquist, J., dissenting), and constitute "judicial overreaching." *Jenkins*, 115 S. Ct. at 2067 (Thomas, J., concurring). Absent underlying systemic violations, therefore, the injunction terms merely set prophylactic rules, designed to "assur[e] that no unconstitutional conduct w[ould] occur in the future," "a management role" that was not "entrusted" to the district court under the Constitution. *Hutto*, 437 U.S. at 714 (Rehnquist, J., dissenting).

B. The Injunction Was Not Narrowly Tailored.

The second prong of this Court's test—that remedies be narrowly tailored—provides another ground for vacating the injunction in this case, and is another area the Respondents failed to analyze. Many of the injunction provisions are wildly overbroad. For example, although the inmates conceded that all libraries in the Tucson area

¹⁴ Respondents' claim that Petitioners object to only seven provisions of the injunction misreads Petitioners' argument. *See Resp. Br. at 33-34 and fn. 46.* Petitioners object not only to the seven provisions listed in Respondents' fn. 46, but to the entire injunction as not predicated on constitutional violations and to each of its provisions as not narrowly tailored and lacking in deference to the State. The provisions discussed at length in the Petitioners' Opening Brief, *see Pet. Br. at 37-49*, like the examples above, merely illustrate the overbreadth of the injunction.

are adequate, TR 1/15/92 at 92-93, and their expert agreed that the law library at Perryville was the most complete prison law library he had ever seen, Jt. App. at 82, these libraries are covered by the sweeping injunction in this case. If the injunction were narrowly tailored, they would not be. *See Jenkins*, 115 S. Ct. at 2049-50.

The injunction further not only requires legal assistants and specifies that they be trained, but it also details how and when the assistants must be taught.¹⁶ Since the training itself—particularly that related to torts, immigration, and domestic relations—does not remedy any constitutional violation, such detailed attempts to micromanage the content, length, and manner of training certainly violate this Court's admonition to narrowly tailor the injunction. *See Milliken*, 433 U.S. at 281-82; *Lyons*, 461 U.S. at 104 (in discussing *Rizzo*, noting that "plaintiffs' showing at trial of a relatively few incidents of violations by individual police officers" "did not provide a basis for equitable relief").

Respondents attempt to justify the individual components of the injunction by arguing that the terms are designed to remedy inadequacies in the prison access system identified by the district court. For example, Respondents claim that the complete training program for legal assistants is justified by the court's finding that legal assistants are not sufficiently skilled to provide inmates with adequate assistance. Resp. Br. at 37 (citing

¹⁶ The training provisions require 30 to 40 hours of video-taped classes that all inmates (whether or not they are legal assistants) must be able to view at least once every six months (and portions up to six hours in length must be available for viewing every three months), and 20 hours of live training, which must be made available every six months. All classes are to be taught by individuals with "demonstrated experience and ability in teaching and evaluating legal research and writing." *See Pet. for Cert. App.* at 72a. The special master evaluates not only the teachers' experience and ability, but also reviews the syllabus and schedule for the classes. *See id.* In addition, the injunction specifies testing requirements. *Id.* at 71a-72a.

Pet. for Cert. App. at 30a). Similarly, Respondents contend that the district court was justified in requiring the State to provide more legal assistants because the court found the number of assistants "inadequate." *Id.* at 36 (citing *Pet. for Cert. App.* at 44a). The isolated injuries shown at trial, however, do not justify systemic relief. *See Lyons*, 461 U.S. at 105-06. The injunction is not narrowly tailored.

C. Prison Administrators Were Accorded No Deference in Retrofitting the *Gluth* Injunction to Remedy Any Infractions in This Case.

The final prong of this Court's test requires deference to prison officials when determining whether a structural injunction is overbroad. 433 U.S. at 280-81. Prison officials should be accorded "wide-ranging deference" in adopting policies and practices needed to run their institutions. *See Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (citing four cases). Yet, deference is a concept to which the Ninth Circuit and the district court gave only a passing nod.

Respondents claim that the district judge appropriately deferred to state prison authorities because the State's attorneys were allowed to object to an injunction previously formulated in a different case. *See Resp. Br.* at 30. This procedure, however, denied Petitioners any meaningful opportunity to propose their own solutions and to have them considered fully and fairly in the first instance; it merely afforded the opportunity after-the-fact to object to predetermined remedies. This process shows no deference to state prison administrators. For example, while the special master did reduce the hours of library operation slightly after Petitioners objected, the master ignored Petitioners' argument that the inmates had never alleged or proved that the hours of operation the Department of Corrections had originally set were not adequate or interfered with the inmates' access. Petitioners objected to the imposition of *any* remedy in this area; tinkering with the

hours and such other minor concessions do not demonstrate the required deference to state officials.

By merely recycling the *Gluth* injunction¹⁶ and applying it on a statewide basis, the district court wholly failed to tailor the statewide remedy to the facts presented during the three-month trial in this case and to defer to state prison officials with respect to how to implement relief. Recycling an old injunction to remedy unfound violations was clearly not the intent of this Court when it required that "judicial answers" stem from constitutional violations "'rather than [from] a court's idea of how best to operate a detention facility.'" *Rhodes v. Chapman*, 452 U.S. 337, 351 (1981) (quoting *Bell*, 441 U.S. at 539).

The requirement of deference to state officials does not exist simply to make States feel good; there are constitu-

¹⁶ The injunction in this case was not fashioned by counsel for the State submitting proposals for remedying any constitutional violations found by the district court judge. As Respondents acknowledge, see Resp. Br. at 31, the injunction came about in an unusual way: After trial, but before any injunction had been fashioned, the district judge provided the special master with an injunction from *Gluth*—an access case that rested on different and uncontested facts—and ordered that it be recycled and imposed in this case:

For those issues that have been resolved successfully in *Gluth*, the Court intends to implement the *Gluth* policies statewide, with any modifications that the parties and Special Master determine are necessary due to the particular circumstances for the prison facility.

Pet. for Cert. App. at 49a (emphasis added). He thus demonstrated his intent to impose wholesale an order from another case that corrected violations not shown to exist in the present case. The judge went further in his Order. After repeating the above language, he specified: "For those issues resolved in *Gluth*, the Special Master shall implement the injunctive relief set forth in *Gluth v. Kangas*, [Exhibit A], with modification deemed appropriate because of the particular circumstances of the facility." *Id.* at 51a (emphasis added). With the *Gluth* order as the foundation for the injunction in this case, all the major terms of the injunction had already been set. Petitioners could only object to minutiae.

tional and prudential underpinnings for it. Core principles of federalism counsel restraint when federal courts propose to impose their vast equity powers on state prison officials. As this Court has noted, "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973); see *Turner*, 482 U.S. at 89 (special need for judicial deference to decision-making by prison officials requires use of the rational basis test, if "prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operations"); *Bell*, 441 U.S. at 547 (prison officials should be accorded "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security" [internal citations omitted], even when these policies "infring[e] a specific constitutional guarantee"). Principles of federalism and comity require that State officials be permitted to run their own institutions. *Jenkins*, 115 S. Ct. at 2054; *Freeman v. Pitts*, 503 U.S. 467, 489 (1992).

Given the fundamental federalism concerns implicated by institutional orders, federal courts must be especially mindful of the obligation to tailor the scope of the remedy to fit the nature and extent of the constitutional violation. *Milliken*, 433 U.S. at 280; see also *Rhodes*, 452 U.S. at 351. The remedy here was not sufficiently tailored and did not defer to the prison administrators' judgments; rather, the injunction reveals that the judge substituted his beliefs on how best to operate the prison's access program.¹⁷ The ruling exceeds the power of the district

¹⁷ Equity is supposed to be stable and predictable. To make it so, judges must apply "'objective factors to the maximum extent possible,'" *Rhodes*, 452 U.S. at 346 (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980)), not personal preference or opinion. Otherwise, there is no standard by which a reviewing court can evaluate the district judge's equitable remedies and no standard to guide the conduct of citizens.

court and impermissibly places the management of the state prison's access program in the hands of the federal judiciary. *See Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976) (holding that a district court "exceeded its authority" in enforcing an overbroad decree).

Arizona's judgments about how best to provide inmates with reasonably adequate access to the courts are constitutionally sound and the courts below erred in failing to respect those judgments.

CONCLUSION

For the foregoing reasons and those set forth in Petitioners' Opening Brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

KEITH J. HUDSON #91888
Camp J—Cuda 1-R-3
Angola, Louisiana

Enter above the full name of the
plaintiff or plaintiffs in this action

versus

CSO II Jack McMillian
CSO II Marvin Woods
Lt. Arthur Mezo

Enter above the full name of the
defendant or defendants in this action

COMPLAINT

I. PREVIOUS LAWSUITS:

- a. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

Yes () No (X)

- b. If your answer to A is yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit

Plaintiffs:

2a

Defendants: _____

2. Court (if federal court, name the district; if state court name the parish):

3. Docket number: _____

4. Name of Judge to whom case was assigned:

5. Disposition (for example, was the case dismissed? Was it appealed? Is it still pending?):

6. Approximate date of filing lawsuit: _____

7. Approximate date of disposition: _____

II. PLACE OF PRESENT CONFINEMENT: *La. State Penitentiary, Angola, La.*

a. Is there a prisoner grievance procedure in this institution?

Yes () No (X)

b. Did you present the facts relating to your complaint in the prisoner grievance procedure?

Yes () No (X)

c. If your answer is YES:

1. What steps did you take? *There is no grievance procedure. However, letters were written to the Camp Supervisor Major D. Klone [sic] and Warden Ross Maggio, Jr.*

2. What was the result? *Major Kalone having personally seem [sic] my condition had me sent to the hospital then placed in Administration Ld.*

3a

d. If you answer is NO, explain why not? *There is no prisoner grievance procedure employed here and only the above mention [sic] action was taken.*

III. PARTIES:

(In Item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

a. Name of plaintiff: *Keith J. Hudson #91888*

Address: *La. State Pen., Angola, La. Camp J Cuda 1-R-3*

(In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants.)

b. Defendant *CSO II Jack McMillian* is employed as *Correctional Sargant [sic]* at *La. State Pen. Camp J*

c. Additional Defendants. *CSO II Marvin Woods and Lt. Arthur Mezo, all are employed at La. State Penitentiary as Correctional Officers at Camp J*

IV. STATEMENT OF CLAIM:

State here as briefly as possible the FACTS of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. DO NOT GIVE ANY LEGAL ARGUMENTS OR CITE ANY CASES OR STATUTES. If you intend to allege a number of related claims, number and set forth each claim in a seperate [sic]

paragraph. (Use as much space as you need. Attach extra sheets if necessary.)

SEE ATTACHED

I.

On the morning of October 30, 1983, I was written up by Officer Marvin Woods who claimed I had called him all types of disrespectful names, which allegation is untrue and merely instigated by officer Jack McMillian, who has a background and reputation for unjust and unnecessary harrassment [sic]. Lt. Mezo came to the area and wanted to know what the problem was and I explained to him that these officers were harrassing [sic] me for no vaild [sic] reason and that I had been written up also for no vaild [sic] reason. At this time Officer Woods told me that I had better shut my mouth if I knew what was good for me. When I asked him why he was threatening me he stated that he was and what could I do about it. I asked Lt. Mezo did he hear that and he said "No"; inmate Edward Allen stated that he heard it. Lt. Mezo told Allen that he had better shut [sic] before he would be in for it also. Allen tried to explain that these two officers were harrassing [sic] for no reason. Lt. Mezo told both Edward Allen and myself to pack our stuff that we were going to lockdown.

II.

While waiting to be transferred to administrative lockdown I was given two disciplinary reports (1) alleging that inmate Allen and I were arguing with each other and that we had to be locked up because we were creating a disturbance on the teir [sic], (2) and the other was for alleged obscenity to an

officer; neither are lock up offenses and these charges were only engineered for insidious reasons.

III.

After being handcuffed & Shackled and under full restraint, I was led from my cell into the lobby of Cuda 1, and at that time Officers Woods and McMillian began shoving me against the wall, and Lt. Mezo motioned with his hands, and these officers took me outside on the walk way of Cuda and began punching me in the face and kicking me; officer McMillian told officer Woods to hold me still so he could knock my gold teeth out of my mouth, and officer McMillian began punching me repeatedly in the mouth, and at that time Lt. Mezo came outside and said "don't have to [sic] much fun", and officer Woods was hitting me in the back and then walked me to Cuda 3 door where I was then taken to Cell #9 in lockdown.

IV.

After being uncuffed inside the cell, bleeding and swelling about the face and brusied [sic] about the body, I asked to be taken to the hospital for my injuries which were extensive. Officer Woods told me to catch sick call and then Lt. Mezo came to my cell and asked me what the problem was attempting to make the inmates in lockdown think he was unaware of what had happened to me. I told Lt. Mezo that he knew that I need [sic] to go to the hospital and he knew what the problem was, Lt. Mezo then told me that nothing was wrong with me and walked off.

After the shift changed I requested of CSO II Wendell Arnold to see the Captain or Lt. the time was approx. 5:a.m. At approx. 11:30 [sic] a.m. Lt.

Dubroc came and I asked him to please allow me to go to the hospital and he told me to hold on; I waited all day until 6: p.m. when the shift had changed again and the same shift that had abused me had come back on duty, Captain L. Dupont came to my cell and asked what had happened, but before I could explain Lt. Mezo whispered in his ear and they walked off.

Monday October 31, 1983 upon shift change again I asked Officer Glynn Blades to see the Lt. or Captain, this officer ignored me. When I received breakfast I told Cadet King that I couldn't eat and I needed to see the Captain or Lt. and he replied "Ok". I saw nobody until I went to D.B. Court. I informed the Court that I had been beaten, however, the court was not interested in my explanation [sic] even though it was apparent that I had been beaten and had received no type of medical treatment. They said that their only concern was the reports before then [sic] and not me, the D.B. Board was Major James Teer and a Classification Officer by the name of Williams and I was represented by inmate counsel Tony Roberts. After leaving Court I saw Capt. Merridith and asked him could I go to the hospital, Capt. Merridith told me this and I quote "I would like to but if I send you over there now they are only going to say that you did it to yourself."

Upon shift change I asked to see the Capt. or the Lt., at maybe 11:p.m. Capt Cole came and I explained my stroy [sic], and he told me that I would be placed on sick call. On November 1, 1983 I was [sic] the Medical Technician and gave him my injuries [sic]. Late [sic] on during the day Major Kalone came and talked to me and asked my problem and I told him about the whole incident, he left and later I was told that I was going back to my living quaters [sic] and then I was taken to the

Hospital and examined by a doctor who checked my injuries and had me put on call out to see the dentist.

V. RELIEF:

State briefly exactly what you want the court to do for you. **MAKE NO LEGAL ARGUMENTS. CITE NO CASES OR STATUTES.**

That I be awarded compensatory damages in the amount of Fifty Thousand (\$50,000.00) Dollors [sic] for physical, mental, and emotional anguish due to the unjust and unnecessary beating given by the defendant and the total disregard for providing medical treatment by the ranking security personel [sic]. And further that injunctions be placed against the officers directly involved to prohibit further crulity [sic] to myself and other inmates housed at Camp J.

Signed this ____ day of _____, 19____.

(Signature of Plaintiff or Plaintiffs)

(Jurat Omitted in Printing)

8a

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 88-00169 ACK

DEMONT RAPHEAL DARWIN CONNER
(Enter above the full name of the plaintiff in this action)

vs.

THEODORE SAKAI, WILLIAM OKU, CINDA SANDIN,
IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES,

COMPLAINT
(42 U.S.C. § 1983)

(Filed Mar. 14, 1988)

I. Previous Lawsuits

- A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment? Yes(✓) No()
- B. If your answer to A is yes, describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)
1. Parties to this previous lawsuit

Plaintiffs DeMONT R. D. CONNER

9a

Defendants HARROLD FALK, DIRECTOR OF CORRECTIONS DIVISION, WILLIAM OKU, ADMINISTRATOR OF HALAWA HIGH SECURITY FACILITY.

2. Court (if federal court, name the district, if state court, name the county)
DISTRICT COURT OF THE FIRST CIRCUIT HONOLULU DIVISION (CIVIL)
3. Docket number NONE
4. Name of judge to whom case was assigned
HONORABLE FREDERICK J. TITCOMB
5. Disposition (for example: Was case dismissed? Was it appealed? Is it still pending?) D.C. DISMISSED
6. Approximate date of filing lawsuit MARCH 2, 1988
7. Approximate date of disposition D.C. MARCH 3, 1988

II. Place of Present Confinement HALAWA HIGH SECURITY FACILITY

- A. Is there a prisoner grievance procedure in this institution Yes(✓) No()
- B. Did you present the facts relating to your complaint in the state prisoner grievance procedure? Yes(✓) No()
- C. If your answer is YES,
1. What steps did you take? ALL THREE STEPS (INCLUDING OMBUDSMAN)
2. What was the result? AFFIRMATIVE
- D. If your answer is NO, explain why not -N/A-

- E. If there is no prison grievance procedure in the institution, did you complain to prison authorities? Yes() No()
- F. If your answer is YES,
1. What steps did you take? -N/A-
 2. What was the result -N/A-

III. Parties

In item A below, place your name in the first blank and place your present address, in the second blank. Do the same for additional plaintiffs, if any.)

- A. Name of Plaintiff *DeMONT R.D. CONNER*

Address *99-902 MOANALUA HWY. AIEA, HAWAII 96701*

(In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants.)

- B. Defendant *THEODORE SAKAI*, is employed as *ADMINISTRATOR*, at *CORRECTIONS DIVISION*,
- C. Additional Defendants *WILLIAM OKU, ADMINISTRATOR HALAWA HIGH SECURITY FACILITY, CINDA SANDIN, UNIT TEAM MANAGER, HALAWA HIGH SECURITY FACILITY*,

IV. Statement of Claim

(State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and place. Do not give any legal arguments

or cite any cases or statutes. If you intend to allege a number of claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheets if necessary.)

1. ON AUGUST 28, 1987, PLAINTIFF WAS SUMMOND TO THE INSTITUTIONS PAROLE BOARD HEARING/INTERVIEW ROOM TO FACE CHARGES ON ALL ALLEGED MICCONDUCT CHARGES OF WHICH MS. CINDA SANDIN SAT AS THE CHAIRMAN. 2. IT WAS IN THIS HEARING THAT I WAS DENIED THE RIGHT TO QUESTION THE ADULT CORRECTIONAL OFFICER WHO WROTE ME UP. 3. I WAS DENIED TO RIGHT TO REVIEW THE SUBMITTED REPORTS CONCERNING THESE CHARGES. 4. I WAS DENIED THE OPPORTUNITY TO CALL (STAFF) WITNESSES ON MY BEHALF. 5. I WAS DENIED THE OPPORTUNITY TO CALL (STAFF) WITNESSES WHO WERE PRESENT AT THE ALLEGED INCIDENT. 6. I FILED AN INMATE COMPLAINT/GRIEVANCE FORM AT ALL THREE STEPS CONTESTING THE CONVICTION OF THE ABOVE MENTIONED AND OTHER GROUNDS OF WHICH MR. OKU'S REPRESENTATIVE AND MR. SAKAI (DEFENDANTS(CC)) FAILED TO RENDER RELIEF. I'VE ALSO NOTIFIED THE OMBUDSMAN'S OFFICE, AND SO I SUFFERED 30 DAYS ILLEGAL CONFINEMENT AND ENDED UP DOING (6) SIX WHOLE MONTHS OF TERROR, BOTH PHYSICAL AND MENTAL ANGUISH.

V. Relief

(State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.)

12a

PLAINTIFF PRAYS THAT THIS HONORABLE COURT WILL MAKE A DECLARATORY JUDGMENT, AND AWARD PLAINTIFF MONETARY DAMAGES SUCH AS: \$10,000 COMPENSATORY FROM EACH DEFENDANT, AND \$10,000 PUNITIVE FROM EACH DEFENDANT, PLUS REASONABLE ATTORNEY FEE'S AS THIS COURT DEEMS FIT.

Signed this 10th day of March, 1988.

/s/ DeMont R. D. Conner
Signature of Plaintiff

13a

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. CV-N-87-36-ECR
(To be supplied by the Clerk)

WILLIAM MCKINNEY,
(Full Name)

Plaintiff,

vs.

PAT ANDERSON, CAROL PLOYER, H.L. WHITLEY, GEORGE SUMNER, JOHN NYE, DISTRIBUTORS AND OWNERS OF C.M. PRODUCTS INC., BROWN & WILLIAMSON TOBACCO CORPORATION, R.J. REYNOLDS TOBACCO CO.,
Defendants.

CIVIL RIGHTS COMPLAINT
PURSUANT TO 42 U.S.C. § 1983

JURY TRIAL DEMAND
(Filed January 28, 1987)

A. JURISDICTION

- 1) WILLIAM MCKINNEY, is a citizen of Nevada who presently resides at P.O. Box 607 N.S.P. CARSON CITY, NEVADA 89701 NEVADA STATE PRISON.
- 2) Defendant H.L. WHITLEY is a citizen of CARSON CITY, NEVADA 89701 POST OFFICE BOX 607

N.S.P. and is employed as WARDEN. At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? Yes XXX No ——— If your answer is "Yes", briefly explain: HE IS CHARGED WITH THE IMMEDIATE CONTROL OF THE MAXIMUM SECURITY PRISON AND THE WELFARE OF ALL PRISONERS CONFINED (SIC) THEREIN.

- 3) Defendant GEORGE W. SUMNER is a citizen of CARSON CITY, NEVADA P.O. BOX 607 N.S.P., and is employed as DIRECTOR OF PRISON. At the time the claim(s) alleged in this complaint arose was this defendant acting under color of state law? Yes XXX No ——— If you answer is "Yes", briefly explain: HE IS CHARGED UNDER NEVADA STATUTES N.R.S. 209; 4.09 et seq., WITH RESPONSIBILITY (SIC) TO SUPERVISE AND MANAGE THE PENAL, REFORM AND CORRECTIONAL INSTITUTION OF NEVADA; AND TO ENFORCE ALL RULES AND REGULATIONS OF PRISON THEREIN.

(Use the back of this page to furnish the above information for additional defendants.) *SEE BACK OF PAGE [Back Page]* DEFENDANT PAT ANDERSON IS A CITIZEN OF NEVADA AND HIS BUSINESS ADDRESS IS N.S.P. P.O. BOX 607 CARSON CITY, NEVADA 89701 SHE IS EMPLOYED AS ASSOCIATE WARDEN. AT THE TIME THE CLAIMS IN THIS COMPLAINT AROSE SHE WAS ACTING UNDER COLOR OF STATE LAW.

DEFENDANT CAROL PLOYER IS A CITIZEN OF NEVADA AND HER BUSINESS ADDRESS IS N.S.P. P.O. BOX 607 CARSON CITY, NEVADA 89701. SHE IS EMPLOYED AS A UNIT COUNSELOR AT THE PRISON. AT THE TIME THE CLAIMS IN THIS COMPLAINT AROSE. SHE WAS ACTING UNDER STATE LAW.

DEFENDANT R.J. REYNOLDS TOBACCO COMPANY IS A CITIZEN OF WINSTON-SALEM, N.C. 27102, U.S.A. AND HE IS UNDER BUSINESS CONTRACT WITH DEFENDANT PRISON OFFICIALS. AT THE TIME THE CLAIMS IN THIS COMPLAINT AROSE, HE WAS ACTING UNDER COLOR OF STATE LAW: HE HAS A BUSINESS CONTRACT WITH DEFENDANT-PRISON OFFICIALS.

DEFENDANT JOHN NYE IS A CITIZEN OF NEVADA. HIS BUSINESS ADDRESS IS N.S.P. P.O. BOX 607 CARSON CITY, NEVADA 89701. HE IS EMPLOYED AT THE NEVADA STATE PRISON AS A STORE MANAGER. AT THE TIME THE CLAIMS IN THIS COMPLAINT AROSE HE WAS ACTING UNDER COLOR OF STATE LAW.

DEFENDANT C.M. PRODUCTS INC., IS A CITIZEN OF CALIFORNIA. HIS BUSINESS ADDRESS IS P.O. BOX 15436 SACRAMENTO, CALIFORNIA 95813 U.S.A. HE IS A DISTRIBUTOR OF CERTAIN TOBACCO PRODUCTS. AT THE TIME THE CLAIMS ALLEGED IN THIS COMPLAINT AROSE, THIS DEFENDANT WAS ACTING UNDER COLOR OF STATE LAW: HE HAS A BUSINESS CONTRACT WITH DEFENDANT PRISON OFFICIALS.

DEFENDANT BROWN & WILLIAMSON IS A CITIZEN OF LOUISVILLE, KY. 40232 U.S.A. AT THE TIME THE COMPLAINT AROSE THIS DEFENDANT WAS ACTING UNDER COLOR OF STATE LAW: HE HAS A BUSINESS CONTRACT WITH DEFENDANTS-PRISON OFFICIALS.

- 4) Jurisdiction is invoked pursuant to 28 U.S.C. § 1343 (a)(3) and 42 U.S.C. § 1983. (If you wish to assert jurisdiction under different or additional statutes, you may list them below.) PLAINTIFF ALSO INVOKES THE PENDENT JURISDICTION OF THIS COURT; 42 U.S.C. 1981; 42 U.S.C. 1985 (3);

42 U.S.C. 1985; AND THE FIRST AND EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, AND F.R.C.P. RULE 65. 42 U.S.C. 20009-2; 46 F.P.D.2d-11-720 (sic).

B. NATURE OF THE CASE

1) Briefly state the background of your case.

ON OR ABOUT MAY 18, 1986, I MADE REQUEST TO BE MOVED INTO ROOM 93 IN (H) WING AT THE NEVADA STATE PRISON. I REQUESTED TO MOVE BECAUSE MY ROOMMATE (SIC) IS A HEAVY SMOKER. ON OR ABOUT MAY 23, 1986, THE UNIT COUNSEL, (SIC) BURNS SENT WORD BY THE UNIT OFFICER THAT I WOULD BE MOVED. I WROTE WARDEN H.L. WHITLEY AND EXPLAINED MY PROBLEMS TO HIM AND REQUESTED THAT I BE MOVED FOR RESON (SIC) THAT MY ROOMMATE (SIC) SMOKED FIVE PACKS OF CIGARETTES A DAY. I'VE BEEN ASSIGNED TO AND LIVING IN ROOM #86 IN (H) WING SINCE MARCH 1986. I HAVE MADE REQUEST FOR A SINGLE ROOM, I'VE REQUESTED TO BE MOVED IN WITH A NON-SMOKER. I'VE SUFFER (SIC) FROM THE SMOKE, AND I'VE REQUESTED MEDICAL ATTENTION, GEORGE W. SUMNER, DIRECTOR OF PRISONS APPROVED OF JOHN NYE SELLING TOBACCO AND CIGARETTES TO INMATES WITHOUT ADEQUATE WARNING LABELS ON THEM JOHN NYE SELLS THESE ITEMS TO INMATES. THE PRISON STAFF ALLOWS INMATES TO SMOKE CIGARETTES ANYWHERE EXCEPT THE DINING ROOM. THE OWNERS AND DISTRIBUTORS OF C.M. PRODUCTS INC., SELLS BEST BUY CIGARETTES TO PRISON INMATES WITHOUT PROPERLY INFORMING OF THE HEALTH

HAZARDS AN INMATE THAT DOESN'T (SIC) SMOKE COULD ENCOUNTER BY SHARING A ROOM WITH AN INMATE WHO SMOKE (SIC). PLAINTIFFS' (SIC) ROOMMATE (SIC) BUYS THE CHEAPER BEST BUY CIGARETTE ONCE A WEEK. OTHER INMATES SMOKE THE SAME BRAND OF CIGARETTES DAILY WHILE IN CLOSED CONFINES WITH THE PLAINTIFF. CIGARETTE SMOKING IS ALLOWED IN THE CLASS ROOMS AND THE LAW LIBRARY AT THE NEVADA STATE PRISON.

BROWN & WILLIAMSON TOBACCO CORPORATION SELLS BUGLAR CIGARETTE TOBACCO TO THE PRISON INMATES' CANTEEN WITHOUT PROVIDING WARNINGS ON THE PRODUCTS TO ALERT THE NON-SMOKER OF THE HEALTH HAZARDS HE WILL ENCOUNTER BY BEING HOUSED WITH INMATES WHO SMOKE. PLAINTIFF ROOMMATE, (SIC) LAWRENCE GREEN, BUYS AND SMOKES BUGLAR AND SO DO OTHER INMATES IN (H) WING.

AT THE NEVADA STATE PRISON BLACK AND WHITE INMATES ARE HOUSED ON AN EQUAL BASIS: ON OR ABOUT MAY 18, 1986, THERE WAS A ROOM OPEN (VACANT) IN (H) WING IN UNIT #2 FOR A BLACK INMATE, BUT PRISON OFFICIALS, KNOWING PLAINTIFFS' (SIC) REQUEST TO MOVE INTO THE PARTICULAR ROOM, MOVES A WHITE INMATE INTO THE ROOM FORCING PLAINTIFF TO STAY IN THE ROOM WITH A HEAVY SMOKER. ALL OF MY ROOMMATES (SIC) HAVE BEEN HEAVY SMOKERS. PLAINTIFF IS PRESENTLY HOUSED IN THE ROOM WITH ANOTHER HEAVY SMOKER AND HAS MADE NUMEROUS REQUEST (SIC) TO MOVE. PRISON OFFICIALS DO NOT SCREEN INMATES FOR PERSONAL HABITS THAT MAY BE DETREMENTAL (SIC)

TO PLAINTIFFS' (SIC) HEALTH BEFORE HOUSING THEM TOGETHER. THAT R.J. REYNOLDS TOBACCO COMPANY SELLS (CAMEL CIGARETTES) TO PRISON OFFICIALS WHO IN TURN SELLS THEM TO PRISONERS. NONE OF THE TOBACCO PRODUCTS SOLD TO PRISONERS PROVIDE THE PROPER INGREDIENTS INFORMATION. THAT CAMEL CIGARETTES ONCE LIT WILL BURN CONTINUOUSLY RELEASING SOME TYPE OF CHEMICAL.

THAT R.J. REYNOLDS TOBACCO COMPANY HAS A BUSINESS CONTRACT WITH DEFENDANT PRISON OFFICIALS.

DEFENDANT PRISON OFFICIALS HAVE DONE NOTHING TO SEPARATE THE NON-SMOKING INMATES FROM THE SMOKERS.

THE NEVADA STATE PRISON IS OVER CROWDED.

THERE ARE NINETY SIX (96) INMATES IN EACH UNIT IN THE PRISON'S GENERAL POPULATION AND APPROXIMATELY SIXTY SIX (66%) OF THOSE SMOKE CIGARETTES.

C. CAUSE OF ACTION

- 1) I allege that the following of my constitutional rights, privileges or immunities have been violated and that the following facts form the basis for my allegations: [If necessary you may attach up to two additional pages (8½" x 11") to explain any allegation or to list additional supporting facts.]

a)(1) County I: HEALTH DAMAGES BY CIGARETTE SMOKE

(2) Supporting Facts: (Include all facts you consider important, including names of persons involved,

places and dates. Describe exactly how each defendant is involved. State the facts clearly in your own words without citing legal authority or argument.)

MY NOSE BLEED (SIC) AND RUN MUCUS CONSTANTLY; ESPECIALLY (SIC) WHEN I HAVE TO ENHALE (SIC) CIGARETTE SMOKE. THE ROOM IS VERY SMALL AND THE LIVING QUARTERS AND THE LAW LIBRARY IS NOT EQUIPED (SIC) WITH AIR CONDITION. I HAVE HEADACHES OFTEN. AND I DON'T HAVE ENERGY TO EXERCISE.

b)(1) Count II: SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT

(2) Supporting Facts:

THE DEFENDANT DISTRIBUTORS' CIGARETTE PRODUCTS DO NOT SHOW WHAT CHEMICALS ARE USED TO CURE AND PACKAGE THEIR CIGARETTES AND TOBACCO. I'M SHORT OF BREATH AND I HAVE CHEST PAINS THAT STARTED IN MARCH 1986.

c)(1) Count III: DENIED EQUAL PROTECTION OF LAW

(2) Supporting Facts:

C.M. PRODUCTS INC., PROVIDED AN INADEQUATE WARNING ON THEIR (BEST BUY) CIGARETTES; THE WARNING PERTAINS ONLY TO PREGNANT WOMEN. LABELS CONTAINS (SIC) NO INFORMATION AS TO THE INGREDIENTS OF THE CIGARETTES.

D. PREVIOUS LAWSUITS AND ADMINISTRATIVE RELIEF

- 1) Have you begun other lawsuits in state or federal courts dealing with the same facts involved in this

action or otherwise relating to the conditions of your imprisonment? Yes XXX No — If your answer is "Yes", describe each lawsuit. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

a) Parties to previous lawsuit:

Plaintiffs: WILLIAM McKINNEY

Defendants: WILLIAM LATTIN, et al.

b) Name of court and docket number:

U.S. DISTRICT COURT DISTRICT OF NEVADA CV-S-85-314;R.D.F.;

c) Disposition: (For example: Was the case dismissed? Was it appealed? Is it still pending?) THE CASE IS STILL PENDING

d) Issues raised: SUBJECTED TO RACIAL DISCRIMINATION, CRUEL AND UNUSUAL PUNISHMENT AND DENIAL OF DUE PROCESS.

e) Approximate date of filing lawsuit:
2/16/1985

f) Approximate date of disposition:
N/A

- 2) I have previously sought informal or formal relief from the appropriate administrative officials regarding the acts complained of in Part C. Yes XXX No — If your answer is "Yes", briefly describe how relief was sought and the results. If your answer is "No", briefly explain why administrative relief was not sought.

I'VE MADE NUMEROUS REQUEST TO MOVE IN WITH A NON-SMOKER. MY LAST REQUEST (SIC) WAS MADE TO PRISON OFFICIALS ON OR ABOUT 12-10-86 BUT I'VE RECEIVED NO RESPONSE.

E. REQUEST FOR RELIEF

- 1) I believe that I am entitled to the following relief:

THAT THIS COURT ISSUE A PRELIMINARY INJUNCTION AGAINST DEFENDANT PRISON OFFICIALS PROHIBITING THEM FROM HOUSING HIM WITH INMATES WHO SMOKE. THAT EACH DEFENDANT BE SUED IN HIS OFFICIAL, PERSONAL AND INDIVIDUAL CAPACITY; THAT EACH DEFENDANT PAY PLAINTIFF \$1,000,000.00 IN PUNITIVE DAMAGES; THAT EACH DEFENDANT PAY PLAINTIFF \$100,000.00 FOR SUBJECTING HIM TO CRUEL AND UNUSUAL PUNISHMENT; THAT EACH DEFENDANT PAY PLAINTIFF \$5,000,000.00 FOR JEOPARDIZING (SIC) HIS HEALTH; THAT EACH DEFENDANT PAY PLAINTIFF ATTORNEY FEES AND COURT COST.

IN PRO PER

Signature of Attorney (if any)

N/A

(Attorney's full address and telephone number)

(illegible)

Signature of Plaintiff

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the plaintiff in the above action, that he has read the above complaint and that the information contained therein is true and correct. 28 U.S.C. § 1746. 18 U.S.C. § 1621.

22a

Executed at CARSON CITY, NEVADA 89701
(Location)

on DECEMBER 18, 1986.
(Date)

(illegible
(Signature)

FOR ARGUMENT

14

Supreme Court, U.S.

FILED

SEP 29 1995

No. 94-1511

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

SAMUEL LEWIS, DIRECTOR, ARIZONA DEPARTMENT
OF CORRECTIONS, ET AL., PETITIONERS

v.

FLETCHER CASEY, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

DREW S. DAYS, III
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37P

QUESTION PRESENTED

Whether the courts below applied the proper legal standards in deciding that the Arizona Department of Corrections violated state prisoners' right of access to the courts.

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FOR THE NINTH CIRCUIT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

INTEREST OF THE UNITED STATES

This case involves the constitutional right of prisoners to meaningful access to the courts. The Attorney General is responsible for protecting the constitutional rights of prisoners under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.* In addition, the United States Bureau of Prisons operates 81 prisons that may be affected by the Court's decision in this case. The United States has an interest in ensuring that the law regarding access to the courts protects the rights of inmates while taking into account the legitimate concerns of prison authorities and governmental entities. The United States filed amicus curiae briefs in *Hudson v. McMillian*, 503 U.S. 1 (1992), *Turner v. Safley*, 482 U.S.

78 (1987), and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), each of which concerned the rights of prison inmates and the constitutional obligations of prison officials.

STATEMENT

1. Inmates incarcerated in the Arizona state prison system filed this class action in 1990 against the Arizona Department of Corrections (ADOC) under 42 U.S.C. 1983. The inmates alleged that the ADOC's state-wide policies and practices violated the inmates' constitutional right of access to the courts. After a three-month bench trial, the district court held that the ADOC had violated the inmates' constitutional right of court access under *Bounds v. Smith*, 430 U.S. 817 (1977), and subsequent cases.¹ The constitutional deficiencies identified by the district court fell primarily within two categories: access to court by inmates in segregation, and access by illiterate and non-English speaking inmates.

a. The district court first found that inmates who are segregated from the general prison population for security or disciplinary reasons (known as "lockdown

¹ In prior litigation, the same district court had held that the ADOC's provisions for access to the courts in its Florence Central Unit Facility were constitutionally inadequate. See *Gluth v. Kangas*, 773 F. Supp. 1309 (D. Ariz. 1988), aff'd, 951 F.2d 1504 (9th Cir. 1991). In that litigation, the court found that ADOC officials had demonstrated "a callous unwillingness to face the issues," and had engaged in various "diversion tactics," with the result that "[t]he Court was forced to take extraordinary measures to compel the [ADOC] to focus on the merits." 773 F. Supp. at 1312, 1315. At the remedy stage of the litigation, ADOC officials refused to offer a proposed remedy, despite the court's express request that they do so. *Id.* at 1315. The district court's finding of liability, and the remedy that it imposed, were affirmed on appeal.

inmates") "experience severe interference with their access to the courts." Pet. App. 22a.

Most lockdown inmates in Arizona are denied direct physical access to law libraries and must rely on a system of written requests or "kites" in order to obtain legal materials. Pet. App. 21a. The district court found that the ADOC's kite system is ineffectual. Under the kite system, some lockdown inmates are denied all access to legal materials. *Id.* at 22a. Those inmates who are permitted to use the system experience long delays—ranging from several days to several weeks—in receiving library materials or assistance. In addition, certain ADOC facilities impose severe restrictions on the number of books that inmates may borrow at one time, and on the amount of time that legal materials may be retained, with the result that some prisoners are able to borrow only one or two books at a time, and may keep them for no more than 24 hours. *Id.* at 24a. Moreover, some institutions provide access to materials through the kite system only if a lockdown inmate can provide exact citations for the materials requested. *Id.* at 22a.

The district court further found that there is an insufficient number of prisoner "legal assistants"² assigned to aid lockdown inmates, that these assistants receive no training from ADOC, and that they are not sufficiently skilled to provide meaningful assistance to lockdown

² In the Arizona system, inmate "law clerks" and inmate library staff assist prisoners by providing them with requested materials from the law library stacks; inmate "legal assistants" aid other inmates in drafting pleadings. Pet. App. 28a. Inmate law clerks and legal assistants possess no particular qualifications, and neither receive training in legal research or the drafting of pleadings. *Id.* at 30a. The distinction between the two groups is one of function rather than skills or qualifications.

inmates. Pet. App. 24a, 30a, 44a. In addition, only lockdown inmates with pending litigation or ADOC charges are allowed access to legal assistants (*id.* at 22a), nor can prisoners obtain legal assistance or legal materials until they have been in lockdown for two weeks (*ibid.*).

Observing that “[e]ven lockdown prisoners who are intelligent, literate and legally trained are unable to do legal research under [a] paging system that allows only one or two books at a time every couple of days” (Pet. App. 24a), the district court concluded that the kite system fails to provide meaningful access to legal materials. Although petitioners asserted that the kite system was required by staffing, logistical and security concerns, the court found that, “despite these same concerns,” lockdown inmates at some ADOC facilities are allowed physical access to the law library, including direct access to the shelves. *Id.* at 21a-22a. Concluding that petitioners had provided lockdown inmates neither access to an adequate law library nor assistance by persons minimally trained in the law, as required by *Bounds*, the district court held that petitioners’ system violated lockdown inmates’ constitutional right of access to the courts. *Id.* at 42a.

b. The district court next addressed the question of access to the courts by illiterate and non-English speaking inmates. The court found that such inmates make up a substantial proportion of the ADOC population,³ and

³ The court cited studies indicating that 14.5% of the ADOC inmate population is non-English speaking, that 17.2% have reading skills below the sixth grade level, and that 35% have a reading level of seventh grade or below. Pet. App. 25a. The court indicated that trial testimony generally supported the findings of those studies (*ibid.*), but did not make a specific finding as to the number or proportion of func-

that their lack of English reading skills prevents them from doing legal research on their own. Pet. App. 25a. The ADOC has a large, monolingual Spanish-speaking population. Bilingual inmates in its facilities frequently lack the language skills necessary to aid non-English speakers. Moreover, many ADOC facilities have no Spanish-speaking legal assistants, law clerks, or library staff. *Id.* at 29a; Tr. 105-106, 128. The evidence showed, in addition, that there is an inadequate number of inmate assistants available to serve prisoners’ legal access needs (Tr. 111-112, 124, 258-259), and that assistants who are available often lack sufficient training and skills to aid other inmates (see, *e.g.*, Tr. 105, 111, 129). Some inmates, acting without assistance, had had their cases dismissed with prejudice because of their inadequate English literacy skills, while others had been unable to file legal actions for that reason. Pet. App. 25a. Observing that “even the best law library is of no use to prisoners who are functionally illiterate in English” (*id.* at 43a), the court concluded that the ADOC’s system, in which illiterate and non-English speaking inmates “must rely on an inadequate number of inmate clerks with no formalized training or supervision by attorneys * * * fails to comply with the requirements of *Bounds*” (*id.* at 44a).⁴

tionally illiterate and non-English speaking inmates in the ADOC system.

⁴ The district court also determined that the system of law libraries maintained by petitioners failed to provide meaningful court access to general population inmates, and made additional findings regarding the ADOC’s provision of legal supplies to indigent inmates, the availability and confidentiality of photocopies, and interference with attorney/client phone calls. This brief does not directly address those findings.

c. Concluding that "[petitioners'] system fails to comply with constitutional standards," the district court determined that injunctive relief was appropriate. Pet. App. 48a. The court appointed a special master "to work with the parties and develop the proper injunctive relief." *Id.* at 48a-49a.⁵

The district court subsequently adopted the remedial plan proposed by the special master. The plan requires petitioners, *inter alia*, to create an effective testing and training program for inmate legal assistants; to maintain "a sufficient number of at least minimally trained prisoner Legal Assistants" (Pet. App. 70a); to take "[p]articular steps * * * to locate and train bilingual prisoners to be Legal Assistants" (*ibid.*); to recruit qualified law librarians and to train inmate law clerks to run and staff prison law libraries; to recruit bilingual staff and inmate volunteers; to maintain and periodically update complete law collections, including self-help materials and regional reporters; to provide an instructional videotape on legal research to all inmates; to expand library hours; and to allow lockdown inmates access to library facilities, absent demonstrated security concerns. *Id.* at 65a-72a.

2. The court of appeals affirmed in pertinent part. The court first observed that, under *Bounds v. Smith*, States must "assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law," 430 U.S. at 828, and that *Bounds* directed district courts to evaluate "as a whole" the system of court access provided by prisons (Pet.

⁵ The court appointed the special master who had developed the remedy in the *Gluth* litigation. See note 1, *supra*. The remedial decree adopted in this case closely parallels the relief in *Gluth*. See Pet. App. 49a.

App. 5a (quoting *Bounds*, 430 U.S. at 832)). Applying that standard, the court of appeals concluded that the district court had properly found that petitioners' system of access was constitutionally deficient.

With respect to lockdown inmates, the court of appeals held that, while "prisons may deny inmates physical access to the law library if such access would threaten institutional security" (Pet. App. 6a), petitioners had failed to provide these inmates with adequate library access *or* assistance from persons trained in the law, as required by *Bounds* (*id.* at 7a).

With respect to illiterate and non-English speaking inmates, the court of appeals agreed with the district court that, in the circumstances of this case, the provision of a small number of untrained inmate legal assistants or law clerks⁶ did not satisfy *Bounds*' requirement of "meaningful" access. Pet. App. 8a. In doing so, the court rejected petitioners' argument that, by providing a complete law library, it had removed the barriers to litigation erected by imprisonment. *Id.* at 7a-9a. In the court of appeals' view,

[t]his argument is without merit because [the State] overlooks the fact that the restrictions on a prisoner's liberty attendant to imprisonment prevents [*sic*] the prisoner from enlisting the assistance of his family,

⁶ Petitioners maintained a court-ordered training program in their Florence Central Unit Facility as a result of the *Gluth* litigation, see note 1, *supra*, and a limited training program at the Complex law library in Tucson. Pet. App. 30a-31a. After the filing of this action, petitioners promulgated, then rescinded, a plan to provide training in legal research to law clerks and legal assistants system-wide. *Id.* at 31a.

friends, and a myriad of social services and legal aid organizations that would otherwise be available.

Id. at 9a.

The court of appeals rejected petitioners' contention that the district court's remedial order constituted an abuse of discretion. Pet. App. 14a. While noting that a remedy "must do no more and no less than correct a particular constitutional violation," the court observed that "a federal court may order relief that the Constitution would not of its own force initially require if such relief is necessary to remedy * * * [that] violation." *Id.* at 13a. In approving the remedy's requirement of law libraries and trained inmate assistants, the court held that, "even though states may choose which of the two components to provide, this is not to say that a court may never order a mixture of [the two]." *Id.* at 14a (internal quotation marks omitted).

The court of appeals also upheld the other major aspects of the injunction,⁷ including the requirement that ADOC libraries be staffed by individuals with some "basic knowledge of legal research" (Pet. App. 16a) and maintain current, complete sets of certain necessary materials (*id.* at 15a).

SUMMARY OF ARGUMENT

I. The right of access to the courts requires corrections officials to afford inmates a meaningful opportunity to present constitutional claims in a judicial forum. That principle requires officials to consider the general character and circumstances of various inmate populations. While most inmates in a prison system may be afforded

⁷ The court of appeals vacated and remanded parts of the district court's order that related to the special master's fees, the prison's indigency standard, and photocopying costs. Pet. App. 16a-18a.

meaningful court access through the provision of adequate law libraries, some substantial number of inmates may be incapable—due to restrictions on physical access or inadequate language skills—to utilize library facilities without additional assistance. The Constitution does not require any particular system as a means of dealing with this situation; however, the system utilized by prison officials must, when evaluated as a whole, provide meaningful access to all substantial components of an institution's inmate population. When determining whether the constitutional obligations have been satisfied, a court must afford prison officials deference to take into account their serious security, administrative, and fiscal concerns. In this case, the proportion of inmates in the ADOC system who cannot effectively use that system's law libraries is substantial, and the assistance that is currently available to substantial groups within the population fails to allow them to pursue legal claims. The courts below therefore correctly concluded that petitioners' system of judicial access was constitutionally deficient.

II. The Federal Bureau of Prisons (BOP) maintains a flexible system designed to provide all substantial groups within each BOP institution's inmate population a meaningful opportunity to present their claims in a judicial forum. BOP provides access to inmates through a system of satellite libraries, interlibrary services, and other assistance. Functionally illiterate and non-English speaking inmates have access to literate inmates who can assist them, as well as access to referrals to outside resources, language skills training, and, where possible, staff assistance. In some facilities, outside legal aid programs are used to supplement institutional materials and services. BOP's system of judicial access represents

one constitutional method of serving the legal access needs of a diverse inmate population while addressing important security, administrative, and fiscal concerns.

III. We leave to the parties the fact-specific question whether the district court abused its discretion in ordering the particular remedy at issue here. We note, however, that, in formulating relief in the prison context, courts must consider, on an institution-wide basis, the necessity of eliminating constitutional violations and affording remedies to the victims of unconstitutional conduct in the context of the State's important interest in managing the affairs of its correctional institutions. Absent a history of recalcitrance or undue delay, state officials should be offered the opportunity in the first instance to craft a remedial scheme that meets constitutional standards.

ARGUMENT

I. PETITIONERS' SYSTEM FAILS TO AFFORD ADOC INMATES CONSTITUTIONALLY ADEQUATE ACCESS TO THE COURTS

The constitutional right of access requires that prisoners be afforded "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Bounds v. Smith*, 430 U.S. 817, 825 (1977). Providing that opportunity requires, not only that prison officials eliminate undue barriers to inmate access, but also that they "shoulder affirmative obligations to assure all prisoners meaningful access to the courts." *Id.* at 824. The Court has accordingly invalidated prison regulations prohibiting inmates from assisting each other in preparing habeas corpus petitions, *Johnson v. Avery*, 393 U.S. 483 (1969); see also *Wolff v. McDonnell*, 418 U.S. 539 (1974) (extending rule of *Avery*

to inmate civil rights actions). It has also prohibited the imposition of filing fees on indigent inmates, see, e.g., *Smith v. Bennett*, 365 U.S. 708 (1961); *Burns v. Ohio*, 360 U.S. 252 (1959), and required States to provide trial transcripts, see *Long v. District Court of Iowa*, 385 U.S. 192 (1966) (per curiam); *Griffin v. Illinois*, 351 U.S. 12 (1956), and notarial services and writing materials, see *Bounds v. Smith*, 430 U.S. at 824-825, to inmates who are unable to purchase them.

The approach employed in the Court's access cases has been informed and shaped by principles of due process.⁸ Because "due process is flexible and calls for such procedural protections as the particular situation demands," *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); see also *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), government must take into account a population's circumstances and abilities. *Goldberg v. Kelly*, 397 U.S. 254, 268-269 (1970) (due process requires that procedures be tailored to "the capacities and circumstances of those who are to be heard"); see also *Gagnon v. Scarpelli*, 411 U.S. 778, 790-791 (1973); *Lassiter v. Department of Social Services*, 452 U.S. 18, 31 (1981). In the prison context, that approach requires consideration of the general limitations and disabilities of each substantial component of an institution's inmate population, see, e.g., *Vitek v. Jones*, 445 U.S. 480, 497 (1980) (Powell, J., concurring in part) (inmates facing involuntary transfer to mental hospital

⁸ The Court has described the right of access to the courts as a due process requirement, see *Procunier v. Martinez*, 416 U.S. 396, 419 (1974); *Wolff v. McDonnell*, 418 U.S. at 579, as an element of equal protection of the laws, see *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987), and as a manifestation of the right to petition the government for the redress of grievances, see *Turner v. Safley*, 482 U.S. 78, 84 (1987).

must be provided "a qualified and independent adviser"); *Wolff v. McDonnell*, 418 U.S. at 570 (illiterate inmates facing disciplinary proceedings must be allowed assistance from fellow inmates or staff); see also *Gagnon v. Scarpelli*, 411 U.S. at 786-787, as well as the relevant security, administrative, and fiscal concerns of the State, see *Mathews v. Eldridge*, 424 U.S. at 335 (due process involves a balancing of the private interest in a procedural protection against the governmental interest).

The *Bounds* holding addressed the situation of "inmates able to present their own cases." 430 U.S. at 824. It did not address the kind of assistance necessary to provide court access to inmates who are unable to utilize law libraries and who are therefore unable to research their cases without some other form of assistance. *Ibid.*⁹ In determining the type of assistance required for populations with such special needs, we believe that the Court should be guided by the approach that characterizes the due process inquiry and by *Bounds*' admonition that " 'meaningful access' to the courts is the touchstone." *Id.* at 823 (quoting *Ross v. Moffitt*, 417 U.S. 600, 616 (1974)).

The proper approach to determining whether constitutional obligations have been satisfied should, in our view, incorporate at least two basic principles. First, in implementing the right recognized in *Bounds*, prison authorities must be afforded a considerable degree of flexibility in structuring a system that accommodates each insti-

⁹ Petitioners therefore err in attaching dispositive significance to *Bounds*' use of the disjunctive in requiring "adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. at 828 (emphasis added). See Pet. Br. 34. Nothing in *Bounds* remotely suggests that a population of inmates unable to use a library nevertheless is not entitled to assistance beyond provision of a library they cannot use.

tution's serious security, administrative, and fiscal concerns. The Court has frequently emphasized the importance of "afford[ing] appropriate deference and flexibility to state officials trying to manage a volatile environment." *Sandin v. Conner*, 115 S. Ct. 2293, 2299 (1995) (citing *Hewitt v. Helms*, 459 U.S. 460, 470-471 (1983); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977)). The concerns facing prison authorities weigh heavily against the imposition of a rigid requirement that a particular system of assistance be adopted. With meaningful court access as the touchstone, prison authorities therefore have "wide discretion" in determining the way in which they will satisfy the access right. See *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment) (quoting *Bounds v. Smith*, 430 U.S. at 833). As the *Bounds* Court repeatedly noted, see 430 U.S. at 828, 830-831, 832, the Constitution does not require that a prison system provide any particular type of assistance, so long as meaningful access is afforded. Consequently, prison authorities may constitutionally choose to provide court access through a variety of means.

Second, the right of access to the courts does not require that institutions maintain a system that guarantees that each inmate will receive assistance specifically designed for his or her particular needs. Rather, the Constitution requires that prison authorities consider the general circumstances and abilities of each institution's inmate population. Where prison officials have established a system that is reasonably calculated to provide court access to all substantial components of an institution's inmate population, minor deficiencies or isolated lapses in the operation of that system will not typically

rise to the level of a constitutional violation.¹⁰ If prison officials do not offer a structure reasonably calculated to afford a substantial group of inmates a meaningful opportunity to challenge alleged deprivations of constitutional rights, however, additional protections must be instituted.

A. Court Access By Lockdown Inmates

The majority of the ADOC's lockdown inmates are required to use an ineffective "kite" system, under which they have no sufficient opportunity to review legal materials or prepare adequate pleadings. Pet. App. 21a-24a. While kite or paging systems are not necessarily invalid, the lower courts have repeatedly found that, standing alone, they have not proved adequate in practice to provide meaningful court access. See, e.g., *DeMallory v. Cullen*, 855 F.2d 442, 447 (7th Cir. 1988) (exact-cite paging system, without more, is unconstitutional); *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985) (same); *Corgain v. Miller*, 708 F.2d 1241, 1248, 1250 (7th Cir. 1983) (same); *United States ex rel. Para-Professional Law Clinic v. Kane*, 656 F. Supp. 1099, 1104 (E.D. Pa.) (same), aff'd, 835 F.2d 285 (3d Cir. 1987) (Table), cert. denied, 485 U.S. 993 (1988); see also 2 M. Mushlin & D. Kramer, *Rights of Prisoners* § 11.04, at 27 (2d ed. 1993) ("use of book paging systems as an exclusive mechanism of gaining access to courts has been for-

¹⁰ As discussed below, see pp. 21-23, *infra*, the standard of proof in cases in which an individual inmate alleges that prison authorities have denied him or her judicial access on an isolated or episodic basis (e.g., a prison guard's refusal to transmit a complaint) should differ from the standard applicable in cases such as this one, in which inmates allege a systemic denial of access to the courts. Where an individualized violation is identified, the appropriate remedy will be based on the scope and nature of the violation.

bidden"). The district court's findings in this case establish that petitioners' kite system similarly does not provide adequate legal access for lockdown inmates. The court found, *inter alia*, that petitioners' system completely denies some inmates access to legal materials (Pet. App. 22a), imposes insuperable time, quantity, and specificity restrictions on others (*id.* at 22a, 24a), and is plagued by delays of up to several weeks in providing materials (*id.* at 24a).

Petitioners do not dispute the district court's factual findings, but instead contend (Pet. Br. 36) that the restrictions placed by ADOC on lockdown inmates' library access "bear a rational relationship to legitimate State penological interests," and are therefore valid under *Turner v. Safley*, 482 U.S. 78 (1987). That contention is incorrect.

Bounds does not hold that inmates must be provided direct access to law libraries irrespective of security, administrative, or fiscal concerns; prison authorities should and do have broad discretion in determining the method by which legal access will be provided, based on the conditions existing in a particular institution or facility. See 430 U.S. at 825, 830-832; see also *Toussaint v. McCarthy*, 801 F.2d 1080, 1109 (9th Cir. 1986) (prison officials "may preclude physical access [by segregated inmates] if such access would interfere with institutional security"), cert. denied, 481 U.S. 1069 (1987). Accordingly, prisons may satisfy their constitutional obligations under *Bounds* by utilizing "satellite" libraries, see, e.g., *DeMallory v. Cullen*, 855 F.2d at 446-448 (approving creation by prison officials of satellite library for use by segregated inmates); *Smith v. Bounds*, 538 F.2d 541, 543 & n.1 (4th Cir. 1975) (approving library plan providing for "smaller core libraries" for prisoners in non-punitive segregation),

aff'd, 430 U.S. 817 (1977), or by supplementing or replacing incomplete library access with "adequate assistance from persons trained in the law." 430 U.S. at 828.¹¹ Such assistance, moreover, may be provided in a variety of ways. *Id.* at 830-832. Where prison authorities deny inmates library access for extended periods such as those in this case, however, they must provide some meaningful and effective substitute.

The courts below did not deviate from those principles. See, e.g., Pet. App. 41a-42a (district court opinion) ("The prison may preclude physical [library] access to segregated inmates if such access would interfere with institutional security."); *id.* at 6a (court of appeals opinion) ("[T]he Constitution does not guarantee a prisoner unlimited access to a library and * * * [p]rison officials of necessity must regulate the time, manner, and place in which library facilities are used.") (internal quotation marks omitted). Rather, those courts correctly concluded that petitioners have provided to lockdown inmates neither adequate library access nor an adequate substitute. *Id.* at 42a-43a. Petitioners have not chosen to employ a satellite library system, and their kite system has proved inadequate. The district court expressly found that existing inmate assistants are not sufficiently

¹¹ See, e.g., *Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978) (approving use of a paging system, where the State supplemented that system with state-funded legal counsel or trained legal assistants), cert. denied, 442 U.S. 911 (1979); *Corgain v. Miller*, 708 F.2d at 1247-1250 (where State provided legal assistance, access to legal materials could be restricted); *Holt v. Pitts*, 702 F.2d 639, 640-641 (6th Cir. 1983) (State may deny physical access to law library to ensure prison security when inmate has access to persons trained in the law); *Nordgren v. Milliken*, 762 F.2d 851, 853-855 (10th Cir.) (State provided adequate access to the courts by providing legal assistance to inmates in drafting pleadings), cert. denied, 474 U.S. 1032 (1985).

skilled to provide meaningful aid to lockdown inmates (*id.* at 24a), and that assistants are only made available to lockdown inmates with *pending* cases (*id.* at 22a). Because petitioners' system, when evaluated as a whole, does not compensate for the inadequacy of library access afforded to lockdown inmates, it does not satisfy the State's constitutional obligations.

B. Court Access By Illiterate And Non-English Speaking Inmates

As a general matter, prison administrators may satisfy literate, English speaking inmates' right of access to the judicial system by providing an adequate law library. See *Bounds v. Smith*, 430 U.S. at 830-832. See also *DeMallory v. Cullen*, 855 F.2d at 446; *Campbell v. Miller*, 787 F.2d 217, 229-230 (7th Cir.), cert. denied, 479 U.S. 1019 (1986); *Morrow v. Harwell*, 768 F.2d at 623; *Cepulonis v. Fair*, 732 F.2d 1, 6 (1st Cir. 1984). As the Court recognized in *Bounds*, 430 U.S. at 826-827, inmates who are literate in English and have access to an adequate law library are generally capable of raising "serious and legitimate" claims in the courts. An English-literate inmate who claims to have been beaten or arbitrarily punished by correctional personnel, for example, can, with access to "self-help" legal guides and other appropriate materials, file a pleading that states a colorable constitutional claim.¹² Once an inmate has suc-

¹² For example, the inmate petitioner in *Hudson v. McMillian*, 503 U.S. 1 (1992) (use of physical force against prisoner may constitute cruel and unusual punishment even where prisoner does not suffer serious injury), proceeded pro se prior to the appointment of counsel by this Court. See *Hudson v. McMillian*, 929 F.2d 1014 (5th Cir. 1990). The inmate respondent in *Helling v. McKinney*, 113 S. Ct. 2475 (1993) (prisoner stated cause of action under Eighth Amendment for exposure to secondary tobacco smoke), also filed his complaint pro se. See

cessfully initiated litigation, the "less stringent standards" generally applied to pro se pleadings, see *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam), and courts' discretionary authority to appoint counsel pursuant to 28 U.S.C. 1915(d) (civil rights actions) and 18 U.S.C. 3006A(g) (federal habeas corpus actions), help to ensure meaningful access to a judicial forum for the consideration of the inmate's claims. See also *Neitzke v. Williams*, 490 U.S. 319, 327-328 (1989) (dismissal of *in forma pauperis* complaints for frivolousness under Section 1915(d) proper only where claim "lacks even an arguable basis in law," or where factual contentions "are clearly baseless").

On the other hand, an inmate who can neither read nor draft basic English language documents is not afforded meaningful access to the judicial process merely because a law library exists at the institution in which the inmate is incarcerated. The courts of appeals have recognized that prison officials do not discharge their constitutional obligations solely by providing books to prisoners who are not able to read them. See, e.g., *Knop v. Johnson*, 977 F.2d 996, 1006 (6th Cir. 1992) (for illiterate and semi-literate prisoners, "there can be no meaningful access to the judicial system unless some literate person is available"), cert. denied, 113 S. Ct. 1415 (1993); *Cruz v. Hauck*, 627 F.2d 710, 721 (5th Cir. 1980) (same); *Valentine v. Beyer*, 850 F.2d 951, 956 (3d Cir. 1988) (same). See also *Battle v. Anderson*, 614 F.2d 251, 255-

McKinney v. Anderson, 924 F.2d 1500, 1502 (9th Cir.), vacated *sub nom. Helling v. McKinney*, 502 U.S. 903 (1991). See also *Gideon v. Wainwright*, 372 U.S. 335, 337 & n.1 (1963) (noting, in a case recognizing indigent defendants' right to appointed counsel in criminal trials, that petitioner's habeas corpus petition was "signed and apparently prepared by petitioner himself").

256 (10th Cir. 1980) (remanding for further proceedings to determine the level of assistance actually provided to illiterate inmates by inmate writ writers).

As discussed above, the right of access of a literate, English-speaking inmate is generally satisfied by providing the inmate with an adequate law library. In our view, in order to satisfy illiterate or non-English speaking inmates' constitutional right of access, such inmates must be afforded an equivalent level of access. Because books alone do not assist illiterate or non-English speaking inmates, additional modes of language and writing assistance must be available to provide those inmates meaningful access to the courts.¹³

Illiterate inmates' right of access to the courts may be met through the assistance of fellow inmates who are literate. Similarly, where adequate numbers of literate, bilingual inmates exist within an institution, their aid to non-English speaking inmates in preparing legal documents can alone be constitutionally sufficient. In some circumstances, however, inmate assistance alone may not be adequate to provide a substantial population of illiterate or non-English speaking inmates with access to the courts that is equivalent to that of literate, English

¹³ Contrary to petitioners' contention (Pet. Br. 7, 34), the requirement that a population of illiterate and non-English speaking inmates be afforded competent lay assistance in preparing legal materials does not constitute "optimal access." We do not understand the court of appeals to have held that prison officials may afford constitutionally adequate judicial access to illiterate and non-English speaking inmates *only* by providing bilingual legal assistants who are trained in the law. The court's central holding, rather, is that the Constitution requires a system that affords substantial groups of illiterate or non-English speaking inmates the same opportunity to prepare and file legal papers as is available to inmates who are sufficiently literate in English to enable them to use petitioners' law libraries.

speaking inmates who have access to a prison law library. This will be true, for example, where (as the district court found in this case) there are insufficient numbers of other prisoners who are literate, available to help, and able to communicate effectively with those who need assistance.

In such circumstances, the Constitution does not require that a prison system provide any particular mode of assistance. For example, in addition to inmate-to-inmate assistance, institutions may adequately address the access needs of illiterate and non-English speaking inmates by making interpreters and readers available in order to translate legal materials into an understandable form and to facilitate the drafting of pleadings. Alternatively, institutions may choose to facilitate contacts by prisoners with legal resources outside the prison, or to arrange with outside organizations to provide legal or paralegal representation (and, where appropriate, translation services) to particular inmate populations. The common practice of supplementing prison law libraries with some form of professional legal counselling or representation¹⁴ is another method of providing constitutionally adequate access to the courts. *Bounds v. Smith*, 430 U.S. at 830-831.

In this case, the trial court found that ADOC officials do not provide *any* system of assistance that promises to afford meaningful access to inmates who are unable to use a law library on their own because they do not speak

¹⁴ The *Bounds* Court noted that, at the time of the decision in that case, "[n]early half the States and the District of Columbia provide[d] some degree of professional or quasi-professional legal assistance to prisoners." 430 U.S. at 830-831. See also current Federal Bureau of Prisons regulations, 28 C.F.R. 543.15, providing for the maintenance of legal aid programs funded or approved by the Bureau.

English or because they lack the ability to read and write. Pet. App. 25a, 44a. Although petitioners state (Pet. Br. 8) that non-English speaking inmates "may obtain assistance from bilingual law clerks, legal assistants, staff members or inmate translators," the district court expressly found that the bilingual inmates on whom non-English speaking inmates rely are frequently unable to provide adequate assistance, and that many ADOC facilities have no bilingual legal assistants or law clerks. Pet. App. 29a. The district court further found that the legal assistants and law clerks designated by the ADOC to aid non-English literate prisoners were inadequate in number, and lacked the basic skills necessary, to provide meaningful assistance to those inmates.

There is no indication that the district court's factual findings as to the assistance actually available to illiterate and non-English speaking inmates were clearly erroneous. The court of appeals therefore correctly affirmed the district court's finding that petitioners failed to provide constitutionally adequate court access to those inmates.

C. Cognizable Injury

Petitioners argue (Pet. Br. 30-31) that the lower courts improperly imposed liability in this case without proof that ADOC policies or practices actually denied inmates access to the courts. That argument is incorrect.

At issue in this case is prisoners' right to "a reasonably adequate opportunity" to present constitutional claims to the courts. *Bounds v. Smith*, 430 U.S. at 825. That opportunity is denied, and the right infringed, when prison officials fail to provide an effective system of

judicial access.¹⁵ "In our adversary legal system, few things can be as prejudicial as the denial of basic legal resources.' When an inmate complains that the basic elements needed to use that system are lacking, 'the complaint carries an inherent allegation of prejudice.'" 2 M. Mushlin & D. Kramer, *supra*, § 11.01, at 11 (quoting *DeMallory v. Cullen*, 855 F.2d at 449) (footnote omitted).

Petitioners' contention (Pet. Br. 32) that inmates' rights are violated only when their individual claims are extinguished or dismissed due to lack of assistance is contrary to this Court's access cases. In *Johnson v. Avery*, 393 U.S. 483 (1969), for example, the Court invalidated a prison regulation prohibiting inmates from assisting each other in legal matters. The *Avery* Court did not require a showing that uneducated inmates had missed a filing deadline or had had claims dismissed, but instead relied on the district court's finding that, "if [illiterate] prisoners cannot have the assistance of a 'jail-house lawyer,' their possibly valid constitutional claims will never be heard in any court." *Id.* at 487.

Where an inmate alleges an isolated or episodic denial of judicial access, that inmate should be required to demonstrate actual prejudice—i.e., that the challenged denial

¹⁵ The court of appeals stated that "it is the State's burden to provide meaningful access and to demonstrate that its chosen method is adequate." Pet. App. 5a (correct in original). If, by that language, the court meant to place on the defendants the burden of demonstrating the absence of a constitutional violation, it was mistaken. See, e.g., *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 584 (1935) ("the burden of establishing the unconstitutionality of a statute rests on him who assails it"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-278 (1986) (plurality) (same). The questions presented by the petition, however, do not turn on disputed factual findings. We do not believe, therefore, that the burden of proof employed below is pertinent to this Court's decision.

actually had, or is about to have, an adverse effect on the inmate's existing or putative constitutional claim. Here, as in *Avery*, however, the district court identified a systemic failure by prison officials to provide meaningful access to substantial components of the inmate population. The court's finding that respondents sought to, but could not, utilize petitioners' system to research, prepare, or file meaningful legal papers (e.g., Pet. App. 24a, 25a, 28a) suffices to establish a violation of respondents' access rights.¹⁶

¹⁶ The district court expressly found that, "[a]s a result of the inability to receive adequate legal assistance, prisoners who are slow readers have had their cases dismissed with prejudice," and that "[o]ther prisoners have been unable to file legal actions." Pet. App. 25a. As to illiterate inmates, the district court's ruling satisfies even petitioners' overly stringent prejudice requirement.

There has been disagreement among the courts of appeals as to whether inmates must demonstrate "actual prejudice" in cases, like the present one, of systemic failure to provide meaningful access. Compare *DeMallory v. Cullen*, 855 F.2d at 448 (showing of actual prejudice required "only where minor or indirect limitations on access to courts are alleged"); *Peterkin v. Jeffes*, 855 F.2d 1021, 1041 (3d Cir. 1988) (actual prejudice standard applies only to "ancillary features" of court access systems, not to cases "directly involving prisoners' access to legal knowledge"); and *Chandler v. Baird*, 926 F.2d 1057, 1063 (11th Cir. 1991) (dicta indicating that a showing of prejudice should not be required in class actions where the challenge "is systemic" or "go[es] to the heart of any meaningful access to libraries, counsel, or courts") with *Crawford-El v. Britton*, 951 F.2d 1314, 1322 (D.C. Cir. 1991) (deprivation must be linked to an "adverse litigation effect"), cert. denied, 113 S. Ct. 62 (1992). The substantial majority of circuits addressing the question have held that, although a showing of prejudice is required where an inmate alleges episodic or minor denials of court access, such a showing is not required in cases of systemic failure. See Pet. App. 41a (citing *Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989)). The court of appeals in this case declined to address the question of

II. THE FEDERAL BUREAU OF PRISONS' ACCESS PROCEDURES ILLUSTRATE ONE METHOD OF PROVIDING CONSTITUTIONALLY ADEQUATE COURT ACCESS TO DIVERSE INMATE POPULATIONS

In the two decades since the *Bounds* decision, the Federal Bureau of Prisons (BOP) has developed a system of policies, materials, and services designed to facilitate judicial access by federal inmates. Through the availability of library access, inmate assistance, and self-help materials, BOP provides meaningful access to all categories of BOP inmates, while accommodating each institution's security, administrative, and fiscal concerns. BOP's approach to the access right is not the only method of satisfying the access obligation, nor are any particular BOP access policies constitutionally required; the "intricacies and range of options are of sufficient complexity that state legislatures and prison administrators must be given 'wide discretion' to select appropriate solutions." *Murray v. Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment) (quoting *Bounds v. Smith*, 430 U.S. at 833). However, BOP's legal access system provides one effective method of accommodating inmates' interests as well as legitimate correctional concerns. See *Turner v. Safley*, 482 U.S. at 93 (considering, *inter alia*, BOP practices and policies in determining whether feasible alternatives to state prison's inmate correspondence restrictions existed); *Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974) ("While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction.").

"actual injury," concluding that that issue was "not now before [it]." Pet. App. 6a n.3.

BOP maintains a system of approximately 250 "main," "satellite camp," and "basic" law libraries to ensure that inmates in its 81 institutions are afforded meaningful access to the courts. See generally 28 C.F.R. 543.10-543.16 ("Inmate Legal Activities"). Each BOP institution is required to maintain a main law library that contains, among other things, federal reporters, federal statutes and rules of procedure, federal regulations, BOP program statements, treatises, self-help manuals, forms, *Shepard's Citations*, and Spanish/English dictionaries. Satellite camp and basic law libraries contain the most commonly used materials from the larger main library collections, and may request other materials from the larger collections when necessary.

Under BOP regulations, "[w]ith consideration of the needs of other inmates and the availability of staff and other resources, the Warden shall provide an inmate confined in disciplinary segregation or administrative detention a means of access to legal materials, along with an opportunity to prepare legal documents." 28 C.F.R. 543.11(j). BOP inmates who are denied physical access to the main law library due to security or other concerns may utilize the basic or satellite camp libraries to perform preliminary research, and then may request additional materials from the main law library. Requests for additional materials are ordinarily made through an "Inmate Request to Staff Member" form, and are generally filled by the institution's Education Department staff within a few working days of the request—although the volume of inmate demands in light of staffing resources may lengthen the time in particular cases. While some facilities provide inmates with the requested volumes, others provide photocopies of the materials to the inmate. Inmates may keep a reasonable quantity of personal legal

material in their living quarters, although the warden may limit the amount kept, based on safety or house-keeping concerns. See 28 C.F.R. 543.11(a) and (j).

The Central Office Librarian, the Supervisor of Education, and their respective staffs are responsible for the system-wide coordination of library services. Institutions ordinarily have inmate law clerks on duty to provide assistance with materials and to answer general questions.

Absent special security concerns, inmates can and do assist each other in performing legal research and preparing legal documents. 28 C.F.R. 543.11(f).¹⁷ Inmate law clerks provide assistance to other inmates in utilizing library materials and, in some institutions, aid in the preparation of legal documents.¹⁸ In addition, BOP staff

¹⁷ In eight institutions BOP has established formal legal aid programs, which are operated in conjunction with legal organizations and law schools. Those programs provide inmates with an array of legal services, including the preparation of habeas corpus petitions and civil rights claims. See 28 C.F.R. 543.15(a) (providing that such programs "[are] expected to provide a broad range of legal assistance to inmates," and that "[s]taff shall allow these programs generally to operate with the same independence as privately retained attorneys"). Where such programs are in effect, BOP regulations permit wardens to impose restrictions on inmate-to-inmate assistance.

¹⁸ As a result of the decision in *Knop v. Johnson*, *supra* (requiring the Michigan Department of Corrections to provide trained inmate assistants to illiterate and non-English speaking inmates), BOP has established a pilot program within the Sixth Circuit, under which inmate law clerks are trained and specifically assigned to assist inmates who are illiterate, have limited mental capacities, or do not speak English, in researching and preparing legal documents. BOP selects inmate law clerks for that program based on the applicant's education, prior legal research experience, language and writing skills, and projected release date. Inmates applying for law clerk positions are required to study a self-help manual and pass a written training

members frequently refer inmates to outside legal organizations, provide inmates with form pleadings furnished by local courts, answer questions about BOP policy, and facilitate attorney-client visitation.

Illiterate and non-English speaking inmates have their court access needs met through a combination of these methods at different BOP facilities.¹⁹ Assistance from fellow inmates and referral to resources that may be available in the community are the primary means employed. In addition, BOP institutions evaluate an inmate's English language skills when the inmate enters the facility. They also provide general education programs to poorly educated inmates, in order to improve those inmates' literacy and other skills. BOP provides mandatory instruction in literacy skills and English as a second language for illiterate and non-English speaking inmates. 18 U.S.C. 3624(f) (Supp. V 1993).²⁰

examination. Inmates in need of assistance may request the aid of an inmate law clerk through an "Inmate Request to Staff Member" form, and a specific time is designated by prison authorities for the inmate to meet with the law clerk. This approach is one constitutionally permissible method to meet the access needs of these prisoners; we believe that the methods employed in other BOP facilities also satisfy the requirements of the Constitution.

¹⁹ Approximately 9.5% of the BOP inmate population is non-English speaking. Bilingual BOP staff and inmates provide assistance to non-English speaking prisoners in day-to-day matters. BOP institutional rules are routinely translated into Spanish by the Central Office, and translations of rules into other languages are obtained as necessary, based on the characteristics of each facility's population.

²⁰ There are currently three class actions pending against the Immigration and Naturalization Service (INS) in which detained aliens allege that they have been denied access to the courts. See *Kattola v. Reno*, No. CV 94-4859KN (C.D. Cal.); *CARECEN v. Reno*, No. CV 93-4162KN (C.D. Cal.); *Imasuen v. Moyer*, No. 91 C 5425 (N.D. Ill.). Those cases raise issues that may be substantially different from

III. THIS COURT SHOULD BE GUIDED BY TRADITIONAL EQUITABLE PRINCIPLES IN DETERMINING WHETHER THE REMEDY ADOPTED IN THIS CASE WAS AN ABUSE OF DISCRETION

We leave to the parties the fact-specific question whether the district court abused its discretion in ordering the particular relief contained in its injunction in this case. We note, however, several general considerations

those involved in this case. The constitutional principles applicable here do not necessarily apply to aliens detained under the authority of the federal immigration laws. See, e.g., *Reno v. Flores*, 113 S. Ct. 1439, 1449 (1993) ("[I]n the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens.") (internal quotation marks omitted); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("Whatever the procedure authorized by Congress is, it is due process as far as [excludable aliens are] concerned."); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-1039 (1984) (various protections that are applicable in criminal proceedings do not apply in deportation proceedings because such proceedings are purely civil). INS detainees are also often in a significantly different position with regard to court access from the position of inmates imprisoned as the result of criminal convictions. The legal issues concerning their immigration status are decided in an administrative, not a judicial, forum, and they routinely appear before an immigration judge within a matter of weeks after their detention, at which time an interpreter is provided. The average length of detention of an INS detainee is only about 27 days and, unlike most convicted inmates, many detainees are eligible for release on bond during immigration proceedings. In addition, many INS detainees are dispersed in local jails for short-term detention. Because of the relatively brief duration of most INS detentions, training detainees to serve as legal assistants is not a viable option. INS detains over 80,000 individuals over the course of each year; at any one time, 7,000 to 7,500 are in INS custody. INS detainees speak more than 100 different native languages and dialects, and a great many are not English-literate.

that, in our view, should guide this Court in evaluating the district court's remedial order.

"Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safley*, 482 U.S. at 84-85. Where state prison systems are involved, moreover, "federal courts have * * * additional reason to accord deference to the appropriate prison authorities." *Id.* at 85; see also *Procunier v. Martinez*, 416 U.S. at 405. "Once a right and a violation have been shown," however, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). Although the remedy imposed must "be related to the condition alleged to offend the Constitution," *Missouri v. Jenkins*, 115 S. Ct. 2038, 2049 (1995) (internal quotation marks omitted), courts may, under certain circumstances, impose remedial obligations that exceed minimum constitutional requirements.

Because a central goal of equitable relief is to restore the victims of unconstitutional conduct "to the position they would have occupied in the absence of such conduct," *Milliken v. Bradley*, 418 U.S. 717, 746 (1974) (*Milliken I*); see also *Milliken v. Bradley*, 433 U.S. 267, 281 (1977) (*Milliken II*), a remedial decree may impose affirmative obligations designed to achieve that goal, *id.* at 281-282. In addition, the district courts have both the power and the duty to consider recalcitrance and delay on the part of a party in fashioning a complete and effective remedy. A district court's experience with a problem and knowledge of local conditions warrant

substantial deference, *Hutto v. Finney*, 437 U.S. 678, 688 (1978), and may justify a prophylactic response to a recurring or intractable concern, see *id.* at 687 ("taking the long and unhappy history of the litigation into account, the [district] court was justified in entering a comprehensive order to insure against the risk of inadequate compliance"); see also *United States v. Paradise*, 480 U.S. 149, 176 (1987) (plurality opinion).

Finally, state authorities "have primary responsibility for curing constitutional violations." *Hutto v. Finney*, 437 U.S. at 687 n.9. Accordingly, once a violation is identified, local officials should be given an opportunity to propose and implement an effective remedy. *Milliken II*, 433 U.S. at 281. If, however, "[those] authorities fail in their affirmative obligations * * *, judicial authority may be invoked." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 15. Where the constitutional violation at issue may be remedied in a variety of ways, the district court, upon the State's default, is entitled to select and implement a specific remedial scheme.

CONCLUSION

With respect to the issues discussed herein, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 1995

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SAMUEL LEWIS, *et al.*,

Petitioners,

v.

FLETCHER CASEY, JR., *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF OF AMICI CURIAE WASHINGTON
LEGAL FOUNDATION, CONSTITUTIONAL
DEFENSE COUNCIL OF THE STATE OF ARIZONA,
AND ALLIED EDUCATIONAL FOUNDATION
IN SUPPORT OF PETITIONERS**

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

No. 94-1511

SAMUEL LEWIS, *et al.*,

Petitioners,

v.

FLETCHER CASEY, JR., *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF AMICI CURIAE OF THE
WASHINGTON LEGAL FOUNDATION,
CONSTITUTIONAL DEFENSE COUNCIL
OF THE STATE OF ARIZONA, AND
ALLIED EDUCATIONAL FOUNDATION
IN SUPPORT OF PETITIONERS

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF) is a national
non-profit public interest law and policy center with more

than 100,000 supporters nationwide. WLF participates in litigation and administrative proceedings affecting the broad public interest, and has a particular interest in the area of criminal justice. In that regard, WLF has participated as amicus curiae in numerous cases before this Court raising criminal law issues. See, e.g., *Arizona v. Evans*, 115 S. Ct. 1185 (1995); *Davis v. United States*, 114 S. Ct. 2350 (1994).

The Arizona Constitutional Defense Council (CDC) is an independent body created by the Arizona Legislature for the "purpose of . . . restoring, maintaining, and advancing the state's sovereignty and authority over issues that affect this state and the well-being of its citizens by taking any action it deems appropriate." A.R.S. § 41-401(B) (1994). The extraordinarily intrusive order imposed below unquestionably impinges upon Arizona's "sovereignty and authority" over the management of its prisons, an issue that plainly "affect[s] this state and the well-being of its citizens. . . ." Accordingly, CDC has joined in this brief in order to draw the Court's attention to the lower courts' unwarranted departure from this Court's right to access jurisprudence, and in particular, their requirement that Arizona provide legal assistants to certain classes of prisoners even though the State already maintains at least 19 law libraries at its nine facilities throughout the State.

The Allied Educational Foundation (AEF) is a nonprofit charitable and education foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including criminal and public policy. AEF has appeared before this Court along with WLF in a number of cases raising constitutional issues, including criminal cases. See,

e.g., *Arizona v. Evans*, *supra*; *Davis v. United States*, *supra*.¹

SUMMARY OF THE ARGUMENT

This Court's cases on the right of convicted prisoners to access to the courts draw a fundamental line between State action that affirmatively inhibits a prisoner's efforts to prepare and present claims to the courts and State action that affirmatively assists such inmate efforts. The Constitution bars the former, but does not mandate the latter. By requiring Arizona to provide certain classes of inmates with the aid of legal assistants, in addition to the law libraries the State already maintains for the benefit of all prisoners, the courts below have obliterated this line.

ARGUMENT

I. THE CONSTITUTION PROHIBITS THE STATES FROM ERECTING BARRIERS TO PRISONERS' ABILITY TO BRING HABEAS CORPUS OR CIVIL RIGHTS CLAIMS BEFORE THE COURTS, BUT IT IN NO WAY REQUIRES THE STATES TO AFFIRMATIVELY ASSIST PRISONERS (OR ANY OTHER CITIZENS FOR THAT MATTER) IN BRINGING CIVIL LAWSUITS.

The central principle that this Court has enunciated and vindicated throughout its access to the courts jurisprudence is that the States may not impede prisoners' ability to

¹ Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

present habeas corpus or civil rights claims in state or federal court. The first of the Court's cases in this area, *Ex Parte Hull*, 312 U.S. 546 (1941), invalidated a Michigan prison regulation that precluded the filing of "legal documents, briefs, petitions, motions, habeas corpus proceedings and appeals," unless a prison official determined that they were "properly drawn." *Id.* at 548-49. Noting even at that early date that "[t]he considerations that prompted [the regulation's] formulation are not without merit," the Court nevertheless held that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." *Id.* at 549; see also *Cochran v. Kansas*, 316 U.S. 255, 256-57 (1942) (prison rules prohibiting the filing of appeal papers and habeas corpus petition violate the Equal Protection Clause of the Fourteenth Amendment).²

The Court's subsequent cases in this area have applied this principle to strike down filing fees that precluded indigent prisoners from presenting habeas corpus petitions, *Smith v. Bennett*, 365 U.S. 708 (1961), requirements that indigent prisoners pay for transcripts of habeas proceedings, *Lane v. Brown*, 372 U.S. 477 (1963); *Long v. District Court of Lee County, Iowa*, 385 U.S. 192 (1966), and prohibitions upon inmates assisting other prisoners in the preparation of petitions for post-conviction relief, *Johnson v. Avery*, 393 U.S. 483 (1969). In each of these

² As the Chief Justice observed in his plurality opinion in *Murray v. Giarratano*, 492 U.S. 1, 11 & n.6 (1989), the Court's access to the courts cases have at various times grounded the right in the Due Process Clause and in the Equal Protection Clause.

cases, the Court prohibited the State from erecting a barrier that inhibited the prisoner's ability to *himself* prepare and file court papers. In none of these cases did the Court even intimate that the State must affirmatively assist in the preparation of claims by convicted prisoners.

The Court made this distinction explicit in *Ross v. Moffitt*, 417 U.S. 600 (1974), in rejecting a claim that the State must provide counsel for prisoners seeking direct, but discretionary, state appellate review of their criminal convictions and review in this Court. The Court held that cases such as *Smith* and *Lane* "stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues for more affluent persons." *Id.* at 607. The Court explained that its requirement that the State provide counsel to indigent defendants for appeals as of right, announced in *Douglas v. California*, 372 U.S. 353 (1963), "departed somewhat from the limited doctrine of the transcript and fee cases," 417 U.S. at 607, but the Court refused to extend this departure to discretionary appeals. And in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), the Court confirmed that because "[p]ostconviction relief is even further removed from the criminal trial than is discretionary review, . . . [and] States have no obligation to provide this avenue of relief, . . . the fundamental fairness mandated by the Due Process Clause does not require that the state supply a lawyer" to inmates seeking to raise habeas corpus claims. *Id.* at 556-57 (citations omitted).

In sum, on the one hand, *Hull*, *Cochran*, *Smith*, *Lane*, and *Johnson* all stand for the proposition that the State may not prevent or inhibit a prisoner from preparing and filing claims in the courts, while, on the other hand, *Ross* and *Finley* stand for the proposition that the State need not

affirmatively assist the prisoner in formulating and presenting such claims by providing counsel. While *Bounds v. Smith*, 430 U.S. 817 (1977), may well have stretched the prior law governing access to the courts (as the persuasive dissents of Justice Stewart and then-Justice Rehnquist made clear), it certainly did not contradict the principle that the State need not affirmatively assist in the preparation of prisoner claims, as was made absolutely clear in two subsequent decisions by the Court.

In *Bounds*, the Court held that "law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Id.* at 825. As this language makes clear, the law library requirement is best understood as removing a state erected barrier -- the prison walls -- that would otherwise effectively preclude prisoners from presenting their own claims in court. Absent their imprisonment, inmates would be able to utilize public libraries in preparing their petitions. In this regard, *Bounds* does no more than place prisoners in the same position as citizens outside the prison walls with potential claims: each has the opportunity, unfettered by State obstruction, to research, draft, and present to the court any Constitutional (or other) claim that he might have.

The fact that the Court permitted States, as an "alternative" to law libraries, to provide legal assistance through, *inter alia*, trained inmates, paralegals, or clinical programs, *see id.* at 830-31, does not transform *Bounds* into a mandate that States must assist prisoners in the preparation of their claims. The plain purpose of this portion of the Court's holding was to vindicate this Court's traditional policy of providing prison administrators with

the maximum discretion possible consistent with the Constitution. *See id.* at 833 ("Prison administrators thus exercised wide discretion within the bounds of constitutional requirements in this case."). As the Court has repeatedly observed, "the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree." Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safely*, 482 U.S. 78, 84-85 (1987) (quoting *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974)).

Recognizing the considerable expense associated with the establishment of a law library, the *Bounds* Court simply noted that States have the option of employing substitute methods for making the information contained in a law library available to prisoners. *Bounds* did not, however, purport to *require* States to make trained legal assistants available to inmates. To the contrary, the Court made it clear that legal assistants were not necessary when the State provides a law library, and took pains to emphasize that "a legal access program need not include any particular element we have discussed" 430 U.S. at 832.

Any doubt about the scope of the right to access recognized in *Bounds* has been removed by the recognition, in this Court's subsequent decisions in *Finley* and *Murray v. Giarratano*, 492 U.S. 1 (1989), that States may leave inmates "to [their] own resources in collateral proceedings." *Id.* at 20 (Stevens, J., dissenting). As noted above, *Finley* applied the Court's ruling in *Ross* to hold that the State need not provide counsel to inmates seeking

habeas corpus. 481 U.S. at 556-57. Two Terms later, in rejecting a claim that prisoners under a sentence of death seeking state post-conviction relief are entitled to counsel, the Court addressed the argument that *Finley* was somehow limited by the requirement of *Bounds* that States provide law libraries to enable prisoners to prepare their own petitions seeking judicial relief. Observing that "it would be a strange jurisprudence that permitted the extension of that holding to partially overrule a subsequently decided case such as *Finley*," 492 U.S. at 11, the Chief Justice, speaking for a plurality of four justices, held that *Finley* "necessarily imposes limits on *Bounds*." *Id.* at 12.³

Even the dissent characterized *Finley* as holding that it is "permissible to leave an ordinary prisoner to his own resources in collateral proceedings," *id.* at 20 (Stevens, J., dissenting), and sought to distinguish capital cases from the prevailing rule on the basis of the fundamentally different nature of the death penalty, the peculiar features of Virginia's post-conviction review of capital cases, and on the unique restrictions placed on death row inmates, *see id.* at 20-28 (Stevens, J., dissenting).

In short, this Court's right of access cases have drawn a distinct line: the States may not constitutionally place barriers inhibiting the ability of prisoners to prepare and present petitions to the courts, but States need not affirmatively assist inmates in the preparation of their

³ As Justice O'Connor noted, Justice Kennedy's opinion concurring in the judgment was not "inconsistent with the principles expressed" in the plurality opinion. *Id.* at 13 (O'Connor, J., concurring); *see also id.* at 14-15 (Kennedy, J., concurring in the judgment).

claims. *Bounds* is consistent with this standard because -- and only because -- it imposed a disjunctive requirement: law libraries *or* legal assistants. As we now explain, by converting this into a conjunctive requirement -- law libraries *and* legal assistants, the courts below disregarded both the plain language of *Bounds* and the broader logic underlying the Court's other access cases.

II. THE LOWER COURTS HAVE MISAPPLIED THIS COURT'S RIGHT OF ACCESS JURISPRUDENCE BY REQUIRING ARIZONA TO PROVIDE TRAINED LEGAL ASSISTANTS TO SPECIFIED CLASSES OF INMATES NOTWITHSTANDING THE AVAILABILITY OF LEGAL RESOURCES FOR ALL ARIZONA PRISONERS.

It is undisputed that Arizona maintains no fewer than 19 law libraries for the benefit of inmates at the nine prison facilities located throughout the State. *See* Pet. App. A at 2; 43 F.3d 1261, 1265 (9th Cir. 1994); Pet. App. B at 26-28; 834 F. Supp. 1553, 1558-59 (D. Ariz. 1993) (listing libraries). With the exception of prisoners confined to "lockdown" for security reasons (who may receive legal materials in their cells by sending a written request to the law library, *see* Pet. App. B at 21; 834 F. Supp. at 1556), neither the district court nor the court of appeals identified any prisoners who were not given physical access to one of these libraries. Nevertheless, the courts below held that Arizona's failure to provide trained legal assistants both to "lockdown" prisoners and to illiterate and non-English speaking inmates, and its failure to permit prisoners in "lockdown" to have physical access to the library violated the constitutional right of those prisoners to access to the courts. *See* Pet. App. A at 6-9; 43 F.3d at 1267-68; Pet. App. B at 41-44; 834 F. Supp. at 1566-67.

A. Due Process Does Not Demand that States Provide Trained Legal Assistants To Illiterate And Non-English Speaking Prisoners.

There is simply no basis in *Bounds* or in any other decision of this Court for requiring States that have gone to considerable expense to make law libraries available to all prisoners to undertake the additional burden of furnishing legal assistants to illiterate and non-English speaking inmates. In *Bounds*, the Court quite emphatically repeated that the right being announced was one of access to "law libraries *or* alternative sources of legal knowledge." 430 U.S. at 817 (emphasis added); *see also id.* at 825 ("law libraries *or* other forms of legal assistance") (emphasis added); *id.* at 827 ("libraries *or* other forms of legal assistance") (emphasis added); *id.* at 828 ("adequate law libraries *or* adequate assistance from persons trained in the law") (emphasis added); *id.* at 830 ("while adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, our decision here . . . does not foreclose alternative means to achieve that goal").

Thus, *Bounds* could not be clearer that provision of a law library, in and of itself, is sufficient to ensure the prisoners' right of access. Moreover, this Court's decisions in *Ross*, *Finley*, and *Murray* foreclose an extension of *Bounds* to require the States to do more than abstain from interfering with these prisoners' efforts to prepare and file their claims. *See, e.g., Murray*, 492 U.S. at 12 (plurality opinion) (*Finley* "necessarily imposes limits on *Bounds*"); *id.* at 20 (Stevens, J., dissenting) (under *Finley*, it is "permissible to leave an ordinary prisoner to his own resources in collateral proceedings").

The State of Arizona has not in any way impeded these prisoners' ability to prepare and present petitions to the courts. It is true, as the courts below pointed out, that the law libraries the State makes available to all prisoners are not likely to be of much use to prisoners who cannot read English. *See Pet. App. A* at 7; 43 F.3d at 1267; *Pet. App. B* at 43; 834 F. Supp. at 1567. But this impediment to the presentation of successful petitions is not of the State's making. In this regard, illiterate and non-English speaking prisoners stand in the same shoes as their counterparts outside the prison walls who are unable to take advantage of public libraries to prepare their own civil rights claims. It would turn due process on its head to require the State to provide a legal assistant to help an illiterate prisoner prepare a civil rights complaint while denying such aid to his illiterate brother who has never been convicted of a crime.⁴

⁴ The court of appeals contended, without citation to the record or any other source, that this argument "overlooks the fact that the restrictions on a prisoner's liberty attendant to imprisonment prevents the prisoner from enlisting the assistance of his family, friends, and a myriad of social services and legal aid organizations that would otherwise be available." *Pet. App. A* at 9; 43 F.3d at 1268. To the contrary, there is no reason why an inmate cannot receive assistance from family, friends, and legal aid organizations (such as the groups that have represented respondents in this case). To be sure, the logistics of obtaining aid from these sources may be more difficult for the prisoner than for his free counterpart, but this additional inconvenience is of no constitutional moment. As this Court has repeatedly observed, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal (continued...)

B. The Lower Courts Erred In Requiring Arizona To Document The Security Risks Inherent In Permitting Prisoners In "Lockdown" To Have Physical Access To The Law Library.

The courts below also concluded that the access to legal materials Arizona provides to prisoners in "lockdown" status was inadequate, holding that, "unless [Arizona] can demonstrate actual security risks," prison officials "may not routinely prohibit lockdown inmates from physically using the law library." Pet. App. A. at 6; 43 F.3d at 1267. In particular, following circuit precedent, the district court held that "[s]imply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful change [sic] to explore the legal remedies that he might have. Legal research often requires browsing through various legal materials in search of inspiration" Pet. App. B at 42; 834 F. Supp. at 1566 (quoting *Toussaint v. McCarthy*, 801 F.2d 1080, 1109-10 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987)). This ruling simply does not square with this Court's precedents requiring judicial deference to prison authorities, particularly with regard to matters touching upon institutional security. See, e.g., *Thornburgh v. Abbott*, 490 U.S. 401, 409-11 (1990); *Turner*, 482 U.S. at 84-85; *Bell v. Wolfish*, 441 U.S. 520, 546-47 (1979); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974).

⁴ (...continued)
system." *Sandin v. Conner*, -- U.S. --, --, 115 S. Ct. --, --, 63 U.S.L.W. 4601, 4605 (1995) (citations omitted).

Under *Turner*, a prison regulation or practice that impinges upon a constitutionally protected interest may not be invalidated unless plaintiffs demonstrate that it is not "reasonably related to legitimate penological interests." 482 U.S. at 89. There can be no question that the burden on this issue is on the prisoners challenging the regulation or practice, not on prison officials as the courts below held in this case. In *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), for example, the Court reversed a court of appeals decision strikingly similar to that of the Ninth Circuit in this case. In that case, which involved an assertion of free exercise rights, the court of appeals "established a separate burden on prison officials to prove 'that no reasonable method exists by which [prisoners'] religious rights can be accommodated without creating bona fide security problems.'" *Id.* at 350 (quoting decision below). The Court flatly rejected this assignment of the burden of proof to prison authorities, holding that "the approach articulated by the Court of Appeals fails to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators." *Id.* The lack of deference in the case at bar is even more egregious because, unlike in *O'Lone* where the challenged regulations completely precluded any accommodation to the prisoners' interest in participating in the religious service at issue, Arizona accommodates the exercise of the right to access to legal materials of prisoners in "lockdown" by delivering requested materials to their cells.

The lower courts' requirement that Arizona admit prisoners in "lockdown" to the law library unless and until the State provides "documented security reasons" for barring physical access, see Pet. App. A at 6; 43 F.3d at 1267 (citation omitted), cannot stand because it frustrates "the ability of corrections officials 'to anticipate security

problems and to adopt innovative solutions to the intractable problems of prison administration,' and [it fosters] unnecessary intrusion of the judiciary into problems particularly ill suited to 'resolution by decree.'" *O'Lone*, 482 U.S. at 349-50 (quoting *Procunier v. Martinez*, 416 U.S. at 405). Neither respondents nor the courts below even attempted to demonstrate that Arizona's practice of denying prisoners in "lockdown" physical access to the library is not "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. Nor could they, for Arizona's eminently sensible determination that inmates posing enough of a security risk to justify segregation in "lockdown" should not be permitted to roam freely through the law library obviously advances an unquestionably legitimate penological interest.

Finally, the lower courts insisted that *Bounds* requires Arizona to provide legal assistants to "inmates deemed security risks and denied [physical] access to the library." Pet. App. A at 7; 43 F.3d at 1267; *see also* Pet. App. B at 42; 834 F. Supp. at 1566 ("if the state denies physical access to the law library, the state must provide that prisoner with legal assistance"). Of course, *Bounds* said nothing of the sort. It merely held that States must provide "adequate law libraries *or* adequate assistance from persons trained in the law." 430 U.S. at 828 (emphasis added). Nothing in the Court's opinion purported to deprive corrections officials of the discretion to determine the logistics of providing access to the law library to those prisoners found to be security risks. To the contrary, Arizona's decision to provide prisoners determined to be security risks access to the library by bringing requested legal materials to their cells appropriately accommodates the asserted constitutional right while at the same time preserving "due regard for the 'inordinately difficult

undertaking' that is modern prison administration." *Thornburgh v. Abbott*, 490 U.S. at 407 (quoting *Turner*, 482 U.S. at 85).

CONCLUSION

The courts below have lost sight of the deference federal courts must maintain for the decisions of the State officials charged with the responsibility of operating prison systems. This is not a case where Arizona has ignored the constitutional right claimed by the inmates. To the contrary, Arizona has expended considerable resources in a good faith effort to comply with the mandate of *Bounds*, and as a result, the State's 15,346 inmates enjoy the benefit of at least 19 law libraries spread among nine prison facilities. The lower courts' dissection of Arizona's legal access program amounts to nothing more than what this Court condemned at the close of the last Term as "the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Sandin*, 63 U.S.L.W. at 4604.

For the foregoing reasons, *amici* respectfully urge the Court to reverse the judgment of the court of appeals, and return the authority to administer the Arizona prison system to the appropriate State officials.

Respectfully submitted,

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IN THE
Supreme Court of the United States OFFICE OF THE CLERK

OCTOBER TERM, 1995

SAMUEL LEWIS, *et al.*,
v. *Petitioners*,

FLETCHER CASEY, JR., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF OF THE
NATIONAL CONFERENCE OF STATE LEGISLATURES,
COUNCIL OF STATE GOVERNMENTS,
NATIONAL GOVERNORS' ASSOCIATION,
NATIONAL ASSOCIATION OF COUNTIES,
INTERNATIONAL CITY/COUNTY
MANAGEMENT ASSOCIATION,
AND NATIONAL LEAGUE OF CITIES
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Whether the district court's order in this "access to the courts" case exceeds the constitutional requirements set forth in *Bounds v. Smith*, 430 U.S. 817 (1977).

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OCTOBER TERM, 1995

No. 94-1511

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FLETCHER CASEY, JR., *et al.*,
Respondents.

**On Writ of Certiorari to the
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for the Ninth Circuit**

**BRIEF OF THE
NATIONAL CONFERENCE OF STATE LEGISLATURES,
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AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling interest in legal issues that affect state and local governments.

This case presents an issue of continuing importance to *amici*: what must a State do to meet its constitutional obligation to provide prisoners with "access to the courts?" The courts below answered that question by imposing extraordinarily detailed and intrusive obligations on the Arizona Department of Corrections, requiring, among other things, that the Department (1) implement expansive prison law library operating hours; (2) provide fully equipped law libraries at every prison unit with a capacity of 150 or more inmates; (3) provide full-time librarians with law, library science, or paralegal degrees at every prison law library; (4) offer an extensive inmate legal assistant training program; (5) provide a complete set of regional reporters for each law library; and (6) provide trained legal assistants for all inmates. This approach threatens both to impose enormous burdens on *amici*—burdens that will be especially difficult to carry at a time of tight budgets—and to restrict the ability of prison administrators to manage their institutions. *Amici* accordingly submit this brief to assist the Court in the resolution of this case.¹

SUMMARY OF ARGUMENT

A. The prisoner right of access to the courts recognized in *Bounds v. Smith*, 430 U.S. 817 (1977), precludes States from imposing obstacles that would effectively frustrate a prisoner seeking redress in court. But *Bounds* manifestly did not hold, as the courts below appear to have believed, that prisoners must be assured *effective presentation* of their claims

¹ The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to this Court's Rule 37.3.

in court. *Bounds* itself made no such suggestion. And the point is confirmed by the Court's holding in *Murray v. Giarratano*, 492 U.S. 1 (1989), that, even where a particular group of inmates is unable to make effective use of a law library, the State is under no obligation to provide those prisoners with trained legal assistance.

B. This principle leads to the conclusion that the State satisfies its obligation under *Bounds* when it provides prisoners access to an adequate law library—and that the additional measures mandated by the courts below are insupportable. *Bounds* repeatedly indicated that the State must *either* offer a law library *or* make available to prisoners assistance from persons trained in the law. *Bounds* did not suggest that prison systems must provide special legal services to illiterate or non-English speaking prisoners, even though the *Bounds* Court surely was aware of the difficulties faced by such inmates. And the point is again confirmed by *Murray*, where—in the face of a factual finding that death row inmates were incapable of using lawbooks effectively—the Court held that the State need not respond to the particular handicaps of inmates by providing special legal services.

C. The courts below erred in issuing a detailed mandate governing the operation of prison libraries. Their direction to the State failed to take into account the limited resources of the Arizona prison system, the legitimate safety and penological concerns of prison administrators, and the narrow judicial role in prison administration—all considerations that have been emphasized by this Court. Viewed in the light of this Court's holdings, the extraordinarily intrusive order of the courts below dictating the con-

tents of the prison libraries, the degree of access to the library stacks permitted prisoners, the time and manner of access to the library, and the construction of prison library facilities, cannot stand.

ARGUMENT

THE COURT OF APPEALS RECOGNIZED AN IMPROPERLY EXPANSIVE PRISONER RIGHT OF ACCESS TO COURTS

A. *Bounds* Requires Only The Elimination Of Obstacles That Would Frustrate Access To The Courts

This case involves the prisoner right of access to the courts that was first expressly articulated in *Bounds v. Smith*, 430 U.S. 817 (1977). Determining the scope of that right presents unusual difficulties because it has an extraordinarily hazy provenance; the Court has failed to identify with specificity even the provision of the Constitution on which it rests. See *Murray v. Giarratano*, 492 U.S. 1, 11 & n.6 (1989). But the history and purposes of the right of access suggest both its limits and its proper application.

The decisions on which *Bounds* constructed the right of access precluded States from imposing obstacles that would effectively frustrate a prisoner seeking redress in court. See generally *Bounds*, 430 U.S. at 822-824. Thus, the first decision in this line held that "the state and its officers may not abridge or impair [a prisoner's] right to apply to a federal court for a writ of habeas corpus" by exercising a veto over the filing of a habeas petition. *Ex Parte Hull*, 312 U.S. 546, 549 (1941) (emphasis added). The Court subsequently held that a State could not "effectively foreclose[] access" to the courts by re-

quiring payment of docket fees (*Burns v. Ohio*, 360 U.S. 252, 257 (1959)) or purchase of a transcript that was essential for appeal. *Griffin v. Illinois*, 351 U.S. 12, 20 (1956). By the same token, the Court held that inmates could not arbitrarily be precluded from seeking the assistance of fellow prisoners with regard to the preparation of habeas corpus applications and other legal filings. *Johnson v. Avery*, 393 U.S. 483, 489 (1969); *Wolff v. McDonnell*, 418 U.S. 539, 577-580 (1974).

In *Bounds*, the Court built on these decisions in holding that prisons may be required to provide law libraries or equivalent legal resources to prisoners, explaining that States might have "to shoulder affirmative obligations to assure all prisoners meaningful access to the courts." 430 U.S. at 824. Plainly, however, the Court in *Bounds* meant to do no more than require that States "remove[] the barriers to court access that imprisonment * * * erect[s]." *Hooks v. Wainwright*, 775 F.2d 1433, 1436 (11th Cir. 1985), cert. denied, 479 U.S. 913 (1986). As the Court explained in some detail (430 U.S. at 825-827), use of legal materials is essential to meaningful advocacy; yet a prisoner—unlike an otherwise similarly situated person who is not incarcerated²—is denied access to those materials by

² Neither *Bounds* nor any other decision of this Court has suggested that there is a right to any level of legal assistance for individuals who are not imprisoned and who wish "to pursue a fundamental constitutional claim in the courts (e.g. a parolee who seeks through federal habeas corpus to challenge his conviction or through a civil rights action to present a constitutional claim against the parole agency)." Wayne R. LaFare & Jerold H. Israel, *Criminal Procedure* § 11.2(f) (2d ed. 1992). See also *DeShaney v. Winnebago Cty. Soc.*

the State. Provision of a law library, like waiver of a filing fee, therefore is necessary "to assure meaningful access to inmates able to present their own cases." *Id.* at 824.

The courts below, however, proceeded from a different conception of the right described in *Bounds*. They seemed to have it in mind, not only that prisoners must be guaranteed access to the courts, but also that prisoners be assured an *effective presentation* of their claims in court. *Bounds*, however, made no such suggestion. And the limited nature of *Bounds* is confirmed by *Murray*. There, in the face of a factual finding that prisoners on death row were "incapable of effectively using lawbooks to raise their claims" (492 U.S. at 5 (plurality opinion) (citation omitted)), the Court rejected the contention that the State was obligated to provide such inmates "trained legal assistance." *Ibid.* (citation omitted). Instead, the Court found it sufficient that the prisoners be given "adequate and timely access to a law library." *Id.* at 13.

Indeed, any other approach would embark the courts on a journey down what then-Justice Rehnquist called "a slippery slope" (*Bounds*, 430 U.S. at 837 (Rehnquist, J., dissenting)), which would make the drawing of principled and manageable distinctions impossible. After all, the Court has made clear, both in *Murray* and in *Pennsylvania v. Finley*, 481

Servs. Dept., 489 U.S. 189, 196 (1989) ("[T]he Due Process Clauses generally confer no affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.").

U.S. 551 (1987), that inmates seeking legal relief generally are not entitled to state-financed counsel. As a consequence, if States are required to do more than place inmates on a par with unincarcerated persons by providing for access to legal materials—while not having to go so far as actually to assure effective representation for inmates by offering counsel—determining whether the State has done enough in any given case will turn on an exercise of the trial judge's purely subjective judgment. *Cf. Missouri v. Jenkins*, 63 U.S.L.W. 4486, 4494 (U.S. June 12, 1995) (rejecting remedy in part because it was not "susceptible to any objective limitation"). We proceed to consider the holding below in light of these considerations.

B. A State That Provides An Adequate Prison Law Library Need Not Also Offer Specialized Legal Services

1. The limited scope of the right recognized in *Bounds* necessarily leads to the conclusion that the State satisfies its constitutional obligation when it offers an inmate access to an adequate law library—and that the additional measures mandated by the courts below are insupportable.³ As the Court put

³ In this case, the specific elements of the order upheld below that go beyond the core requirement of *Bounds* include: (1) the requirement that the State hire full-time, professionally trained librarians with law, library science, or paralegal degrees for every law library (*see* Pet. App. 66a-67a); (2) the requirement that the State provide trained inmate legal assistants—including bilingual legal assistants—to all inmates, even if the inmates are literate and have physical access to a law library (*id.* at 69a-71a); and (3) the requirement that the State provide a legal assistant training program, including a legal research course approximately 60 hours in length, to be taught by lawyers, law students, or trained paralegals at each law library twice a year, *ad infinitum*. *Id.* at 71a-72a.

it in *Bounds*, “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.” 430 U.S. at 828 (emphasis added). Not only did the Court use this disjunctive formulation no fewer than five times in *Bounds* (*id.* at 825, 828-829), it also went on to add that “adequate law libraries are *one constitutionally acceptable method* to assure meaningful access to the courts.” *Id.* at 830 (emphasis added).

As this language suggests, the *Bounds* principle does not—as the court below believed (*see* Pet. App. 7a-9a)—mandate special legal services for illiterate and non-English speaking prisoners. The *Bounds* Court surely was aware of the difficulties faced by such prisoners when it declared an adequate law library sufficient to meet the States’ obligation of assistance. *See Hooks*, 775 F.2d at 1436; LaFave & Israel, *supra*, at § 11.2(f). Indeed, that very problem was specifically acknowledged in an earlier “access to courts” case. *See Johnson*, 393 U.S. at 484. The Court nevertheless indicated that States are obligated only to mitigate the *effects of incarceration*, not all pre-existing problems of individual prisoners that would affect their capacity to exercise their legal rights. *See LaFave & Israel, supra*, at § 11.2(f) (noting that the access right would not necessarily require the state to “offset the limitations of the individual * * * that presumably would restrict his capacity to exercise his right of access even if he were not incarcerated”).⁴

⁴ *See Hooks*, 775 F.2d at 1436-1437; *Bee v. Utah State Prison*, 823 F.2d 397, 398 (10th Cir. 1987); *see also Morrow*

This conclusion is confirmed by *Murray*. As noted above, in that case the district court made a specific factual finding that the special burdens of death row inmates rendered them “‘incapable of effectively using lawbooks to raise their claims’”; as a consequence, the district court held access to an adequate law library insufficient to fulfill the State’s burden under *Bounds*. *See Murray*, 492 U.S. at 5 (plurality opinion) (citation omitted). This Court, however, refused to extend *Bounds* to support that result, holding instead that the State’s policy of either allowing death row inmates time in the prison law library or permitting them to have law books in their cells was constitutionally adequate. *Id.* at 5, 12. In so doing, the Court rejected a reading of *Bounds* that would have required state prison authorities to operate by different rules depending upon the facts of each case, stating:

[t]reating such matters as “factual findings,” presumably subject only to review under the “clearly-erroneous” standard, would permit a different constitutional rule to apply in a different State if the district judge hearing that claim reached different conclusions. Our cases involving the right to counsel have never taken this tack; they have been categorical holdings as to

v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985) (“[*Bounds*] foreclosed the question of the practical utility of a library, concluding that access to a library is access to the courts.”); *Williams v. Leeke*, 584 F.2d 1336, 1341 (4th Cir. 1978) (Hall, J., concurring in part and dissenting in part) (“The state’s obligation considered in *Bounds* is an institutional one which is fulfilled as to all prisoners—even illiterate prisoners—by making legal research materials generally available to inmates * * *”), *cert. denied*, 442 U.S. 911 (1979).

what the Constitution requires with respect to a particular stage of a criminal proceeding in general.

Id. at 12.

That holding dictates the outcome here. The State in *Murray* was not obligated to respond to the particular handicaps of inmates under a capital sentence by providing additional legal assistance, notwithstanding a factual finding that those handicaps rendered the inmates incapable of using lawbooks and the prison library effectively. There is no reason why the handicaps of illiterate or non-English speaking prisoners should dictate a different result in this case. To the contrary, it would be perverse to hold that prisoners with limitations unrelated to incarceration (such as illiteracy) are entitled to a greater right of access to the courts than are death row inmates whose limitations are a consequence of the special burdens resulting from their sentences.

It may be added that the expansion upon *Bounds* worked by the courts below is not necessary to protect a meaningful right of access to the courts for illiterate or non-English speaking prisoners. Those inmates still have a constitutional right to seek the legal aid of their fellow literate inmates. *See Bounds*, 430 U.S. at 824 & n.10 (noting *Wolff's* holding that illiterate inmates have a right to assistance from literate inmates even though an adequate law library is present); *Johnson*, 393 U.S. at 490. Even though an adequate law library may not directly benefit illiterate or non-English speaking prisoners, it does help them indirectly by improving the quality of assistance from literate inmates. Additionally, illiterate prisoners may, with assistance from a literate

inmate if necessary, seek the assistance of counsel.⁵ This puts the illiterate or non-English speaking prisoner on an equal footing with similarly situated unincarcerated individuals, who also would have to seek legal aid or help from English-literate associates to gain access to the courts.

2. In addition, requiring the State to expend scarce legal resources by providing legal assistance beyond an adequate law library will not necessarily inure to the benefit of prisoners. As this Court has often noted, the resources that States may devote to legal services (and to prison systems generally) are limited. *See, e.g., Murray*, 492 U.S. at 11 (plurality opinion); *id.* at 13 (O'Connor, J., concurring). The expense of instituting the programs required by the lower courts in this case would represent a considerable strain on those resources, and might well require a reduction in the expenditures dedicated to providing prisoners legal assistance at trial and during the direct appeal of their convictions—the stages of the process that are crucial in a criminal proceeding.

⁵ The Court has held that the right of "access to courts" necessarily includes a right to seek legal assistance.

[I]nmate must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation of other aspects of the right of access to the courts are invalid.

Procunier v. Martinez, 416 U.S. 396, 419 (1974). This right to seek legal assistance has been used to strike down regulations and practices that prohibit or unreasonably interfere with the solicitation of legal assistance by mail. *See Brewer v. Wilkinson*, 3 F.3d 816 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1081 (1994); *Foster v. Basham*, 932 F.2d 732 (8th Cir. 1991); *Washington v. James*, 782 F.2d 1134 (2d Cir. 1986); *Minnesota Civil Liberties Union v. Schoen*, 448 F. Supp. 960 (D. Minn. 1977).

The Court has recognized the danger of ordering accommodations of asserted constitutional rights without taking these sorts of trade-offs into account. "In the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources * * *." *Turner v. Safley*, 482 U.S. 78, 90 (1987).

A shift of scarce resources from the trial and direct appeal stages of a criminal proceeding to assistance in filing post-conviction collateral attacks would hardly redound to the advantage of prisoners. The trial provides the criminal defendant his principal opportunity to avoid incarceration and is of utmost importance in the criminal justice system. See *Ross v. Moffit*, 417 U.S. 600, 611 (1974). Of secondary but considerable moment is the direct appeal of a conviction, which "is the primary avenue for review of a conviction or sentence * * *." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1993). The right to counsel for an initial appeal from the judgment or sentence of the trial court reflects the importance of this stage of the criminal proceeding. See *Douglas v. California*, 372 U.S. 353 (1963). In contrast, the role of habeas corpus proceedings is secondary and limited. See *Barefoot*, 463 U.S. at 887; *Murray*, 492 U.S. at 10 (plurality opinion). Accordingly, this Court concluded in *Finley* that there was no federal constitutional right to counsel for post-conviction collateral proceedings:

Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. See *Fay v. Noia*, 372 U.S. 391,

423-424 (1963). * * * States have no obligation to provide this avenue of relief, cf. *United States v. MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion), and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.

Id. at 556-557; see also *Murray*, 492 U.S. at 10 (plurality opinion).

Yet the decision below would require States to use scarce resources in providing legal aid to assist prisoners pursuing post-conviction relief. This would preclude the States from making the sensible policy decision to concentrate their resources at the trial and direct appeal stages of criminal proceedings where "[c]apable lawyering * * * would mean fewer colorable claims of ineffective assistance of counsel to be litigated on collateral attack." *Murray*, 492 U.S. at 11 (plurality opinion).⁶ While the pro-

⁶ In addition to the secondary nature of habeas corpus actions, it is useful to note that habeas petitions most often are unsuccessful. "Habeas relief * * * typically has been granted in less than 4% of all petitions filed and an even smaller percentage of petitioners gain release from custody." LaFave & Israel, *supra*, § 28.2; see also David McCord, *Visions of Habeas*, 1994 B.Y.U. L. Rev. 735, 768 (discussing problem of large volume of frivolous habeas actions). Prisoner civil rights actions also are rarely successful. See *Procunier v. Martinez*, 416 U.S. at 405 n.9 (noting problem of frivolous prisoner claims); Douglas A. Blaze, *Presumed Frivolous: Application of Straight Pleading Requirements in Civil Rights Litigation*, 31 Wm. & Mary L. Rev. 935, 935-938 (1990) (discussing problem of frivolous prisoner civil rights claims); *Report of the Federal Courts Study Committee* 48-51 (1990) (proposing new procedure to deal with prisoner civil rights cases, which represented 11 percent of all civil filings in 1989); Federal Judicial Center, *Recom-*

vision of legal assistance to prisoners pursuing post-conviction relief or civil actions might be a good idea in the best of all possible worlds, that does not mean that it should be constitutionally mandated. *See Ross*, 417 U.S. at 618. The difficult policy questions concerning the allocation of limited legal resources should be left to the state legislative and executive branches, which are far better equipped to weigh the advantages and disadvantages of various policies than are the courts. *See Turner*, 482 U.S. at 84; *Procunier v. Martinez*, 416 U.S. 396, 405 (1974); *Murray*, 492 U.S. at 11 (plurality opinion); *id.* at 13 (O'Connor, J., concurring).

C. The Lower Courts' Detailed Mandate Regarding The Contents Of And Access To Prison Libraries Is Insupportable

Allowing prisoners access to a law library thus is sufficient to satisfy the requirements of *Bounds*, provided that the library is "adequate" (430 U.S. at 828) and that the degree of access is "meaningful." *Id.* at 823, 825. To require an *adequate* law library, however, is not to require a perfect or superior one. *See Procunier v. Martinez*, 416 U.S. at 420 (prison not required to adopt every proposal that facilitates prisoner access to the courts); *Lindquist v. Idaho Bd. of Corrections*, 776 F.2d 851, 856 (9th Cir. 1985). By the same token, *meaningful* access does not require

mended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts 9-11 (1980); *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 587 (1972). While this is not to gainsay the importance of the right of access to the courts, it does suggest that increasing the level of state resources devoted to such claims—a step that necessarily will be taken at the expense of other state expenditures—is not a sensible policy.

that prisoners be given unlimited use of library resources. *See Campbell v. Miller*, 787 F.2d 217, 226 (7th Cir.), *cert. denied*, 479 U.S. 1019 (1986); *Harrell v. Keohane*, 621 F.2d 1059 (10th Cir. 1980) (per curiam). Instead, it is enough that the resources made available to prisoners offer them a reasonable opportunity to "prepare petitions for judicial relief." *Murray*, 492 U.S. at 11 (plurality opinion).

At the same time, implementation of this principle requires that courts take into account competing considerations: the limited resources of state prison systems (*see Murray*, 492 U.S. at 11 (plurality opinion); *Turner*, 482 U.S. at 90), the safety and penological concerns of prison administrators (*see Washington v. Harper*, 494 U.S. 210, 223 (1990); *Hewitt v. Helms*, 459 U.S. 460, 473 (1983)), and a scrupulous attention to this Court's explanation of the narrow judicial role in prison administration:

[C]ourts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. * * * The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.

Bell v. Wolfish, 441 U.S. 520, 562 (1979); *see also Block v. Rutherford*, 468 U.S. 576, 588 (1984).

It is well understood that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Bell*, 441 U.S. at 545-546 (citing *Price v. Johnston*, 334 U.S. 266, 285 (1948); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 125 (1977); *Wolff*, 418 U.S. at 555; *Pell v. Procunier*, 417 U.S. 817, 822 (1974)). Indeed, in *Turner* the Court made clear that prison administrators must be free to run their institutions without interference from the courts so long as their policies are rationally related to the safety and economic concerns of the prison (482 U.S. at 89) and do not unduly foreclose "other avenues" for the exercise of prisoner rights. *Id.* at 90. This is no less true of the right of access to the courts. Viewed in light of this principle, the order upheld by the court below reveals a consistent misapplication of the "meaningful access" requirement.

1. *Contents of the Law Library.* Arizona should not be required, as ordered by the courts below, to provide the Pacific Reporter in its prisons' law libraries to meet the constitutional requirement that those libraries be "adequate." To be sure, an adequate prison law library should contain the basic resources necessary to conduct legal research. But it does not follow that every resource that could be useful in a legal research project must be on the shelves of every prison law library. "[P]rison administrators are not required to adopt every proposal that may be thought to facilitate prisoner access to the courts." *Procunier v. Martinez*, 416 U.S. at 420.

Here, a requirement that the Pacific Reporter be provided in Arizona's prison libraries cannot be justified on the grounds that it is a basic resource that

is necessary to conduct legal research.⁷ Indeed, another panel of the Ninth Circuit recognized the lesser importance of regional reporters in rejecting an argument that they had to be included in Idaho prison libraries that already provided the Idaho state reporter: "the Prison need not provide its inmates with a library that results in the best possible access to the courts. Rather, the Prison must provide its inmates with a library that meets *minimum constitutional standards*." *Lindquist*, 776 F.2d at 856 (emphasis added). Notably, the plan that was found constitutional in *Bounds* did not include the regional reporter in its law library inventory. 430 U.S. at 819-820 n.4.

2. *Access to Library Stacks.* The order upheld by the Ninth Circuit requires that all prisoners be allowed direct access to the library stacks, unless prison officials can first document that such access will pose an actual security risk. Pet. App. 67a-68a. The *Bounds* "meaningful access" standard cannot justify this requirement. The inconvenience prisoners may experience from denial of direct access to the library stacks is a minimal infringement on their

⁷ As a result of an earlier district court order, *Wilkinson v. McDougall*, CIV 81-1397 (D. Ariz. Jan. 5, 1984), all 33 of Arizona's state prison law libraries include: the United States Code Annotated; Supreme Court Reporter; Federal Reporter Second; Federal Supplement; Shepards U.S. Citations; Shepards Federal Citations; Local Rules for the Federal District Court; Modern Federal Practice Digest; Federal Practice Digest (Second); Arizona Code Annotated; Arizona Reports; Shepards Arizona Citations; Arizona Appeals Reports; Arizona Law-of-Evidence (Udall); ADOC Policy Manual; 108 Institutional Management Procedures; Federal Practice and Procedure (Wright, Miller, & Cooper); Corpus Juris Secundum; and Arizona Digest.

right of "meaningful" access and plainly is justified by competing safety and administrative concerns.

A restriction on direct prisoner access to the stacks is necessary to serve prison security. See *Harper*, 494 U.S. at 223; *Helms*, 459 U.S. at 473 (safety is a "fundamental responsibility" of prison administration). As the Court has recognized, hardback books are an especially effective vehicle for smuggling contraband. *Bell*, 441 U.S. at 549. It seems not only reasonable but also prudent to deny prisoners a common ground to stash and exchange forbidden material. Books also are an excellent place for inmates to conceal hidden messages to one another. Again, the Court has recognized the State's legitimate security interest in monitoring and controlling inmate communications. *Turner*, 482 U.S. at 91-92. Additionally, prisons must carefully regulate the use of books to prevent vandalism and theft. In light of these obvious and legitimate security and administrative justifications, it is reasonable to restrict direct inmate access to library stacks.

These restrictions are acceptable, of course, because "other avenues" remain available for prisoners to gain access to legal materials. A prison may, for example, use a "call" system by which a prisoner with access to a list of the library's holdings requests that a librarian retrieve particular books from the stacks for him. Under this approach, when the prisoner is finished with the source he turns it in and requests others. Other than the minimal inconvenience of waiting for the librarian to retrieve the source, it is difficult to see how this system would be any less useful than direct access to the library collection. Furthermore, while prohibiting prisoners from browsing through the *stacks* of the prison law

library, this system would still allow prisoners to browse through legal *materials* to follow leads from one source to another. See *Toussaint v. McCarthy*, 801 F.2d 1080, 1110 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987).

For prisoners who are greater security risks, more restrictive practices would be permissible. One method, for example, is a "paging" system whereby prisoners who are not allowed to visit the law library request legal materials or photocopies of those materials that are delivered to their cells.⁸ While this might result in delays between request and receipt of a book, such inconvenience, standing alone, hardly amounts to a denial of access to the courts. Cf. *Bounds*, 430 U.S. at 819 (under approved plan inmates would have to wait between three and four weeks to do one day of legal research). This Court has upheld safety practices that constitute *far more* extensive intrusions on the rights of inmates than the inconvenience of having to wait for particular legal sources. See, e.g., *Harper*, 494 U.S. at 227; *Bell*, 441 U.S. at 558-560.

The requirement that prison officials show a documented security risk before denying a prisoner direct

⁸ Of course, this would assume that the prisoners have some reference materials or other legal assistance (such as inmate paralegals) to help them to determine which materials they should request. Similar systems have been upheld in *Campbell v. Miller*, 787 F.2d 217, 227-228 (7th Cir. 1986); *Cosby v. Purkett*, 782 F. Supp. 1324 (E.D. Mo. 1992); and *Turman v. Romer*, 729 F. Supp. 1276 (D. Colo. 1990). But see *Toussaint*, 801 F.2d at 1108-1110; *Corgain v. Miller*, 708 F.2d 1241, 1250 (7th Cir. 1983) (paging system requiring exact citations is inadequate without references for deriving citations); *Kaiser v. Sacramento*, 780 F. Supp. 1309, 1316 (E.D. Cal. 1991).

access to the library stacks (Pet. App. 68a) also is unjustified. "In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents." *Helms*, 459 U.S. at 474. Requiring documentation of a security risk invites a potential challenge every time the prison administration denies a prisoner direct law library access. If administrators must carefully document every risk to protect themselves against legal challenge, they will face a situation where "complying with * * * marginally helpful procedural requirements" would interfere with the efficient and safe management of the institution. *Id.* at 474 n.7. See *Turner*, 482 U.S. at 89.

3. *Time, Place, and Manner of Access.* The decision below also improperly infringes on the ability of prison administrators to regulate the time, place, and manner in which inmates gain access to and use the prison law library.⁹ "A detention facility is a unique place fraught with serious security dangers" (*Bell*, 441 U.S. at 559), which necessarily requires that "prison officials have broad administrative and discretionary authority over the institutions they man-

⁹ Among other things, the district court: (1) set, within limits, the operating hours and days for the law libraries, without regard to actual use; (2) dictated where the prisoners may sit in the libraries; (3) set the precise procedure for the prisons' response to library access requests; (4) set procedures for removing prisoners who create disturbances from the law library; (5) prohibited the reasonable restraint of prisoners in the law library; and (6) controlled the noise level in the library. Pet. App. 65a-68a.

age." *Helms*, 459 U.S. at 467. See *Meachum v. Fano*, 427 U.S. 215, 229 (1976) ("The federal courts do not sit to supervise state prisons * * *"). While limits on precise hours of library operation, the implementation of library security measures, and the like may create inconvenience for particular inmates, it is difficult to see these as anything more than *de minimis* restrictions that do not warrant court supervision. Cf. *Meachum*, 427 U.S. at 225.¹⁰

The related requirement that prisoners be provided with at least ten hours of access to the law library each week also is impermissibly intrusive. We agree that the time allotted for a prisoner to use the library cannot be so low as to deny "meaningful access." No court looking at the issue, however, has suggested that the *minimum* threshold for meeting the "meaningful access" standard is anywhere near ten hours of access to the prison law library a week. See *Cruz v. Hauck*, 627 F.2d 710, 720 (5th Cir. 1980) (expressing reservations about adequacy of two to three hours a week of access); *Williams v. Leeke*, 584 F.2d 1336, 1340 (4th Cir. 1978) (three forty-five minute intervals a week inadequate); *Nadea v. Helgemoe*, 561 F.2d 411, 418 (1st Cir. 1977) (one hour per week inadequate); *Zatko v. Rowland*, 835 F. Supp.

¹⁰ This is not to say that courts should be foreclosed from ordering a prison system to provide prisoners with "meaningful access" to a law library. When the time provided for prisoner use of the library is "meaningful," however, the courts have no business involving themselves in the minute details of the time of day such access is scheduled, the seating arrangements of prisoners using the library, and the procedures used to process inmate requests for library time. These administrative matters involve precisely the types of day-to-day decisions that should be left to local authorities. See *Bell*, 441 U.S. at 563.

1174, 1178 (N.D. Cal. 1993) (holding a plan providing access of two hours a week, with access of four hours a week for inmates with impending court deadlines, reasonable as a matter of law). In fact, the approach taken by the courts below requires far more prisoner time in the law library than the plan approved in *Bounds* itself. See 430 U.S. at 819 (providing for one full work day at a law library every three to four weeks). Beyond the minimum requirements of *Bounds*—and absent a showing that prisoners are unable to make effective and meaningful use of the library in the time allotted—it should be up to the prison administrators, not the courts, to weigh the costs and benefits that would attend a shift of prison resources from other penological concerns to providing extra library hours.

4. *The Requirement of Additional Prison Libraries.* The order upheld by the court of appeals requires, with some exceptions, that Arizona provide fully equipped law libraries for facilities with a population or capacity of 150 or more. Pet. App. 61a. *Bounds* cannot support this mandate. So long as the State is able to provide prisoners with “meaningful access” to the courts, it should be free to adopt methods other than the expensive construction of new library facilities. The State could, for example, adopt a plan by which prisoners without a law library in their facility are bused to other facilities to do legal research. That is precisely the type of plan found adequate in *Bounds*. 430 U.S. at 819. Alternatively, the State could, in lieu of a full law library, provide these prisoners with some form of trained legal assistance or a limited law library supplemented with legal materials borrowed from elsewhere. See *Campbell*

v. Miller, 787 F.2d at 228-229 (approving a similar plan for high-security prisoners not allowed access to the prison law library). If a court finds that prisoners in facilities without law libraries are not receiving “meaningful access” to the courts, it should allow the State to exercise this wide discretion in creating an access plan, rather than foreclosing innovative solutions that could take into account both the prisoner’s need for “meaningful access” and the limited resources of the state prison system. Cf. *Bounds*, 430 U.S. at 819.

D. The Decisions Below Exceeded The Proper Judicial Role

As the discussion above suggests, the courts below involved themselves in the management of the Arizona prison system at a level of detail and with a degree of intrusiveness that is quite extraordinary. But they did so entirely without justification. While the district court noted imperfections in Arizona’s program (see Pet. App. 19a-41a), the courts below expressly declined to ask the inmates to demonstrate that they were *in fact* denied meaningful access to the courts. See *id.* at 5a. Yet this Court repeatedly has admonished the federal judiciary to respect the limits of the injunctive remedy and to fashion relief that is proportional to any constitutional violation.¹¹

¹¹ See generally *Missouri v. Jenkins*, 63 U.S.L.W. 4486, 4491 (U.S. June 12, 1995) (nature of remedy is to be determined by “nature and scope of the constitutional violation”) (citing *Milliken v. Bradley*, 433 U.S. 267, 280-281 (1977)); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (“[T]he scope of relief is dictated by the extent of the violation established.”); *Bell*, 441 U.S. at 562 (injunctive power should be invoked to remedy only bona fide constitutional violations,

Although the court of appeals dutifully quoted this principle (*id.* at 13a), it made no effort to implement it in practice.

Just last term, in *Missouri v. Jenkins*, 63 U.S.L.W. 4486 (U.S. June 12, 1995), the Court reaffirmed the limits of the federal judiciary's power to order injunctive relief. Recognizing that "local autonomy of school districts is a vital national tradition" (*id.* at 4494), the Court refused to endorse an approach that would have allowed the district court to take over the management of local schools to increase their "desegregative attractiveness" (*ibid.*) and facilitate the creation of a school system "with facilities and opportunities not available anywhere else in the country." *Id.* at 4488. Instead, the injunctive power of the district court was limited to remedying the specific constitutional violation at issue.

Like school administration, management of the local prison system is of "acute interest to the States." *Meachum*, 427 U.S. at 229. "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of the govern-

not to impose judicial policy preferences on the States); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417 (1977); *Keyes v. School Dist. No. 1, Denver, Colorado*, 413 U.S. 189, 213 (1973) (system-wide remedy only appropriate if system-wide violation); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) ("Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary."); Paul S. Mishkin, *Federal Courts as State Reformers*, 35 Wash. & Lee L. Rev. 949 (1978).

ment." *Turner*, 482 U.S. at 84. Thus, when state prison systems are involved the federal courts should be especially careful in respecting their limited role. See *Procunier v. Martinez*, 416 U.S. at 405; see also *Jenkins*, 63 U.S.L.W. at 4501-4502 (Thomas, J., concurring). Cf. *Bounds*, 430 U.S. at 832-833 (praising district court for respecting limits on its role by allowing the State to fashion its own remedy despite the court's expressed preference for alternative approaches). But the order in question in this case embodies the antithesis of that limited judicial role. It involves a serious intrusion into day-to-day management of the Arizona prison system, is overreaching at almost every juncture, and represents an attempt to create an ideal prisoner legal aid system. However desirable this might be as a matter of policy, such a paternalistic "approach should play no part in traditional constitutional adjudication." *Murray*, 492 U.S. at 11 (plurality opinion).

While the court below acknowledged the intrusiveness of its remedy, it suggested that "a federal court may order relief that the Constitution would not of its own force initially require if such relief is necessary to remedy . . . [that] violation." Pet. App. 13a (citation omitted). But whatever its validity in other circumstances, that principle has no application here.¹² Even if extra-constitutional relief

¹² Ironically, the decision that the Ninth Circuit cites for this principle went on to state:

However, our goal is to cure only constitutional violations. The commission of a federal judge is not a 'general assignment to go about doing good.' Accordingly, injunctive restraints that exceed constitutional minima must be narrowly tailored to prevent repetition of proved

were justified in some instances, it would not be necessary to remedy any violation in this case. Unlike an unconstitutionally segregated school system, where the social effects of the wrong vastly complicate the remedy (*see Swann*, 402 U.S. at 6), termination of a denial of access to the courts provides a complete remedy for the constitutional injury. Thus, in this case, there is no rationale for allowing injunctive relief that requires more than the Constitution dictates. Accordingly, this Court should find the injunction upheld by the court below to be impermissibly overbroad.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

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constitutional violations, and must not intrude unnecessarily on state functions.

Toussaint, 801 F.2d at 1087 (citations omitted).

9

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SAMUEL LEWIS, et al.,

Petitioners,

vs.

FLETCHER CASEY, JR., et al.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF AMICUS CURIAE OF THE
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QUESTION PRESENTED

Does *Bounds v. Smith*, 430 U. S. 817 (1977) entitle prisoners to legal assistance superior to that enjoyed by average citizens?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

SAMUEL LEWIS, et al.,

Petitioners,

vs.

FLETCHER CASEY, JR., et al.,

Respondents.

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF PETITIONERS**

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)¹ is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Running a prison is an extraordinarily difficult task. Prison administrators oversee a population of anti-social and violent people. The prisoner's diet, clothing, shelter, and medical needs must be attended to. Furthermore, the administrators must keep the prisoner from harming the outside world, the prison staff, or his fellow inmates. The unwarranted attention of the federal courts can make this already difficult job impossible.

1. Both parties have consented to the filing of this brief.

The decision below places needless, heavy burdens on our prison system. It wastes prison resources, strips administrators of necessary discretion, encourages wasteful, disruptive prisoner litigation, and entitles prisoners to greater privileges than the average citizen. This is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On January 12, 1990, 22 prisoners of the Arizona Department of Corrections ("ADOC") filed a class action suit under 42 U. S. C. § 1983 in the United States District Court for the District of Arizona. *Casey v. Lewis*, 43 F. 3d 1261, 1265 (CA9 1994). One of the many claims was that prison officials unconstitutionally denied the prisoners access to the courts. *Ibid.*

On November 12, 1992, after a three-month bench trial, the District Court ruled that the ADOC's policy for assuring prisoners' access to the courts was unconstitutionally inadequate. It found inadequate: "contents of the library; the access to libraries; the legal assistance for prisoners who are illiterate or who do not speak English; library staffing; the indigency standard for receiving free legal supplies; the photocopying policy . . . ; and restrictions on inmates' telephone calls to their attorneys." *Ibid.* After consulting with a Special Master, the District Court issued a permanent injunction requiring the ADOC to implement the plan developed by the Master to remedy the allegedly inadequate access. *Id.*, at 1265-1266.

The plan was very detailed. It covered such items as: the types of books to be bought by the libraries; what times of the day the libraries would be open; the minimum hours each library was open; notification of schedule changes; the qualifications of librarians; the contents of forms regarding library use; the conduct in the libraries that can be prohibited; the check-out system; the libraries' noise level and how to reduce it; the number, training, and workload of legal assistants; the maximum mark-up for legal supplies sold by the prison; the standard of indigency; and the number of pens, pencils, typing paper, legal pads, file folders, and regular envelopes to be provided to indigents. See *id.*, at 1272-1280 (Appendix A).

The Ninth Circuit affirmed the bulk of the District Court's order. It found that *Bounds v. Smith*, 430 U. S. 817 (1977) mandated the extensive relief proscribed by the District Court. See *Casey*, 43 F. 3d, at 1266.²

SUMMARY OF ARGUMENT

The Ninth Circuit established a dangerous precedent when it required Arizona to provide its prisoners with a greater level of legal services than what is available to the average citizen. If upheld, this precedent would cost much more than the expense of improving the law libraries of Arizona prisons.

Court-ordered luxuries for prisoners eat away at the glue that holds society together. A valid, functioning criminal justice system is essential to civilized society. In order for the criminal justice system to function, we must believe that criminals are appropriately punished for their crimes. When courts provide prisoners with benefits not available to the average citizen, public confidence that criminals get their just deserts diminishes, threatening the social order.

Special treatment of prisoners has further costs. Running a prison is at best very difficult. Once courts start mandating more than basic human needs for prisoners, judicial management of prisons will increase at the expense of the discretion prison administrators need to do their job. The experience of the Texas prison system demonstrates the dangers of such intrusive micromanagement.

Giving prisoners too much access to courts undermines the prison system. As the state is required to bear more and more of the prisoner's litigation, the right of access becomes a subsidy to litigation. This has turned litigation from an avenue of defending basic rights to a leisure activity for prisoners. This undermines administrative authority, creates considerable costs

2. The Ninth Circuit affirmed all of the District Court's judgment except for its decision to award costs and expenses of the Special Master without giving the ADOC the opportunity to object, *id.*, at 1272, a restriction on photocopying pricing, *ibid.*, and a requirement that the ADOC provide electric typewriters to indigent prisoners. *Id.*, at 1271.

to the state, and undermines the faith of citizens that criminals are being properly punished.

The right to libraries found in *Bounds v. Smith*, 430 U. S. 817 (1977) is very limited. The right to access cases before *Bounds* meant only to remove barriers to litigation by prisoners; they were not intended to make the states actively encourage prisoner suits.

While *Bounds* placed a greater affirmative duty on the states than did previous decisions, this duty was very limited. Its right of libraries was not for the purpose of general civil litigation, but only to allow prisoners to file habeas corpus and civil rights actions. The state's duty was further limited by the fact that it merely had to give prisoners the tools to present fundamental claims to the courts; *Bounds* was not intended to guarantee competent prosecution of the prisoner's claim or to blaze new trails in the law.

The decision below violated *Bounds*. By ordering Arizona to provide both libraries and legal assistance to prisoners, the Ninth Circuit directly contradicted the holding of *Bounds* that either a library *or* legal assistance satisfied the right to access.

The Ninth Circuit's micromanagement of Arizona prisons also contradicted this Court's precedents. One constant of the prisoner rights cases is a tradition of deference to the discretion of administrators to conduct the day-to-day affairs of the prison. The Ninth Circuit's exceptionally intrusive order dangerously contravenes this principle.

The decision below also excessively accommodated the prisoners' interests. The provisions for legal assistance it ordered are more lavish than that available to the average citizen. This excess stems from a misperception of what *Bounds* requires. The Ninth Circuit believes *Bounds* is a right to effectively litigate claims; *Bounds* is only concerned with giving prisoners the ability to present basic claims to the courts.

The confusion in the lower courts over what *Bounds* requires demonstrates that *Bounds* must be clarified. This Court should clarify that *Bounds* is a very limited right to bring basic claims to the attention of the courts, that the oversight of Special Masters should only be invoked under extreme circumstances,

and that federal courts should defer to the judgment of prison administrators barring a finding of bad faith.

ARGUMENT

I. The Constitution does not require states to treat its prisoners better than law-abiding citizens.

The present case is about much more than the cost to Arizona of buying Pacific Reports for its prisoners. The Ninth Circuit has engaged in an extreme accommodation of prisoner interests under *Bounds v. Smith*, 430 U. S. 817 (1977), giving Arizona's prisoners considerably greater access to the courts than that possessed by the average citizen. See *post*, at 8-21. This sets a very dangerous precedent for both America's prisons and society at large.

Court-ordered prison libraries are one part of a whole mosaic of judicial interference with prison administration and must be considered within this larger picture. Although libraries will, of course, not prevent prisons from punishing, the decision below improperly chips away at prisoners' punishment, disrupting the calculus of just desert. Furthermore, this expensive litigation subsidy will make the already difficult job of running prisons that much more onerous.

The danger of the decision below is best appreciated in a context larger than the contents of prison libraries. Therefore, Part I A of this brief will discuss society's keen interest in having prisons that punish adequately. Part I B will demonstrate that excessive accommodation of prisoner interests is dangerous to prisons. The relevance of the Ninth Circuit's decision to these points will be shown in Part I C.

A. Societal Needs.

The criminal law is part of the glue that holds society together. Protecting its citizens from crime is a core feature of any civilized government. See *Illinois v. Gates*, 462 U. S. 213, 237 (1983). If people are not protected from crime they are not free. Therefore, the states, the main enforcement arm of the

criminal law, *Patterson v. New York*, 432 U. S. 197, 201 (1977), must be given great discretion in their fight against crime.

"The rights of the States to develop and enforce their own judicial procedures, consistent with the Fourteenth Amendment, have long been recognized as essential to the concept of a healthy federalism. Those rights are today attenuated if not obliterated in the name of a victory for the 'struggle for personal liberty.' But the Constitution comprehends another struggle of equal importance and upon our shoulders the burden of maintaining it—the struggle for law and order. I regret that the Court does not often recognize that each defeat in that struggle chips away at the base of that very personal liberty which it seeks to protect." *Fay v. Noia*, 372 U. S. 391, 446-447 (1963) (Clark, J., dissenting), overruled in *Coleman v. Thompson*, 501 U. S. 722, 749-750 (1991).

The criminal law protects society by punishing transgressors. See 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 1.2(e), at 14 (1986). Punishment serves two important purposes—preventing people from committing crime through deterrence, or incapacitation, see *ibid.*, and expressing society's moral indignation at crime.³ See *People v. Roberts*, 2 Cal. 4th 271, 316, 826 P. 2d 274, 298 (1992); *Gregg v. Georgia*, 428 U. S. 153, 183 (1976) (lead opn.).

For either purpose to work, punishment must actually punish. While incapacitation may not require punishment, deterrence must be punitive. If prison is to deter people from committing crime, it must be perceived to be punitive. See 1 LaFave & Scott, *supra*, § 1.5(a)(3), at 33, n. 2, quoting F. Zimring, *Perspectives on Deterrence* 3 (1971).

Changing the conditions inside prison will thus affect the level of crime. Making prison life easier will lower the cost of committing crime, while lowering the prison's standard of living will make the criminal's vocation less rewarding. Such changes inevitably influence the level of crime.

3. Rehabilitation is also a goal of sentencing, of course, 1 LaFave & Scott, *supra*, § 1.5(a)(3), at 32-33, but it has proved an elusive one, and it is made even more difficult by the decline in prison discipline wrought in the past by excessive judicial interference. See *post*, at 11-12.

"Criminals may be willing to run greater risks (or they may have a weaker sense of morality) than the average citizen, but if the expected cost of crime goes up without a corresponding increase in the expected benefits, then the would-be criminal—unless he or she is among that small fraction of criminals who are utterly irrational—engages in less crime, just as the average citizen will be less likely to take a job as a day laborer if the earnings from that occupation, relative to those from other occupations, go down." J. Wilson, *Thinking About Crime* 175-176 (1975).

The punitive aspect of prison serves a second purpose for society—retribution. "The law is the witness and external deposit of our moral life." O. Holmes, *The Path of Law*, in *Collected Legal Papers* 167, 170 (1920). The criminal law serves our "moral life" by expressing our outrage at crime by punishing criminals. See *Roberts, supra*, 2 Cal. 4th, at 316, 826 P. 2d, at 298; *Gregg, supra*, 428 U. S., at 183; Note, *Causation in the Model Penal Code*, 78 Colum. L. Rev. 1249, 1258-1259 (1978). Although criticized by some scholars, retribution "is the oldest theory of punishment, and the one that still commands considerable respect from the general public." 1 LaFave & Scott, *supra*, § 1.5(a)(6), at 35.

Frustrating this purpose is particularly dangerous. Retribution is intended to maintain respect for the law. If criminals are not punished appropriately, then people may start taking the law into their own hands. See *ibid.* "It may certainly be argued, with some force, that it has never ceased to be one object of punishment to satisfy the desire for vengeance." O. Holmes, *The Common Law* 40 (1881). If society's sense of justice is not satisfied, disorder becomes a real threat.

"To maintain order in society, the legal system must not only provide for a safe society, it must also provide a society that is satisfied with the workings of the system. The law-abiding populace must be assured that those who have done wrong are punished, and that those who are innocent are protected. Otherwise, society will fail in its most basic duty." Rychalk, *Society's Moral Right to Punish: A Further Explanation of the Denunciation Theory of Punishment*, 65 Tulane L. Rev. 299, 320-321 (1990).

Each judicial improvement of the prisoner's lot runs the risk of alienating society from the criminal justice system. When society's representatives in the legislature set the punishment for crimes, a certain harshness of prison life is taken into the calculus of desert. "Prisons also reflect the cultural sensibilities of the larger society in which they are located [citation]. Imprisonment occupies an integral role both in the production and in the reproduction of social norms, values, attitudes, and beliefs." R. Wright, *In Defense of Prisons* 3 (1994).

When an unelected federal court ameliorates prison life *ex post facto*, the equation of guilt and punishment is upset. As the criminal is treated more and more like the average citizen, the bonds that hold us together further fray. Conditions of prison life that are "restrictive and even harsh" are constitutional unless found cruel under contemporary standards. Instead, "they are part of the penalty criminals pay for their offenses against society." *Rhodes v. Chapman*, 452 U. S. 337, 347 (1981). If we are to maintain social order, the courts must respect society's calculus of punishment.

B. Institutional Needs.

Increasing the rights of prisoners has further costs. Running a prison is an exceptionally difficult endeavor. The administration must supply the prisoners with food, clothing, shelter, medical care, work, and recreation while keeping their charges from harming the outside world, the staff, and each other. Therefore, courts give prison administrators "broad discretionary authority . . . because the administration of a prison is 'at best an extraordinarily difficult undertaking . . .'" *Hewitt v. Helms*, 459 U. S. 460, 467 (1983), quoting *Wolff v. McDonnell*, 418 U. S. 539, 566 (1974).⁴

If a federal court intrudes too far into the administration of a prison, the costs can be very high in both money and lives. A particularly vivid example of the high cost of judicial intrusiveness can be found in the tragedy of the Texas prison system.

4. *Hewitt* was disapproved, if not "technically . . . overrule[d]" on other grounds in *Sandin v. Conner*, 63 U. S. L. W. 4601, 4605, n. 5 (slip op., at 10, n. 5) (June 19, 1995).

For many years Texas had a penal system that it could be proud of. While authoritarian, Texas' penal system had a superb safety record, low costs, and an unmatched prisoner education system. See J. DiIulio, *The Old Regime and the Ruiz Revolution: The Impact of Judicial Intervention on Texas Prisons*, in *Courts, Corrections, and the Constitution* 51, 61 (J. DiIulio ed. 1990). In 1974, a federal district court judge in Texas combined several prisoner civil rights suits into one class action suit, and through this case took over the Texas penal system. See *id.*, at 59. *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980).

When the suit was contested, there was controversy over Texas' control model of prisons. Some experts credited it with maintaining "the only safe, clean, cost-effective prison system in the country. Others denounced [the Texas Department of Corrections] as a repressive agency that treated its inmates like slaves." DiIulio, *supra*, at 60.

The District Court was in total agreement with the critics. It issued a 248-page opinion requiring many detailed changes in the way Texas ran its prisons. Among the many requirements were:

"an end to the use of building tenders; a requirement that the agency double its officer force and retrain veteran officers; a revision in the procedures for handling inmate grievances; a complete overhaul of the prisoner classification system that would reduce the number of maximum security designations; a division of the prison population into management units of not more than five hundred each; a radical improvement in health delivery systems that would give inmates easy access to state-of-the-art medical treatment; and the provision of a single cell for each inmate." *Ibid.*

These mandates, the exceptional contentiousness of the litigation, and the District Court's close supervision of Texas prisons helped turn the Texas penal system into an expensive, dangerous disaster. At the low point of the litigation, violence was endemic, discipline was minimal, and staff morale was plummeting. Gang rape and contract murder had become common. See *id.*, at 53. More serious violence occurred in the years 1984-1985 than in the previous decade. *Id.*, at 54. Furthermore "inmate participation in treatment and educational

programs became erratic, the once-immaculate inmate living quarters ceased to sparkle, and recreational privileges were curtailed." *Ibid.* All of this was achieved at a cost of over a billion dollars. *Id.*, at 68.

The old prison system was not perfect. Its use of prisoner trustees called "building tenders" required an unsustainably high level of oversight from prison authorities. See *id.*, at 55-57. This problem played a role in the downfall of the Texas prison system. See *id.*, at 58-59. But the main reason for this decline was judicial overreaching. The District Court, along with poor administrators and "grandstanding state policymakers . . . helped to put asunder, [the Texas system] by making the task of formal prison governance inside Texas prisons much harder and much less personally rewarding." *Id.*, at 69.

Prisons are very complex institutions where sudden changes can have unforeseen, disastrous results. One of the main factors in the problems caused by the *Ruiz* litigation was the District Court's failure to appreciate the unintended consequences of its attempts to reform. See *id.*, at 70. Such problems demonstrate the wisdom of this Court's command to defer to the prison administrator's evaluation of penological objectives. See *O'Lone v. Estate of Shabazz*, 482 U. S. 342, 349-350 (1987). Courts, which lack both the knowledge and resources to administer prisons, are better suited to safeguarding basic principles; the details of prison life are better left to the legislative and executive branches. See *Procunier v. Martinez*, 416 U. S. 396, 404-405 (1974).

Any effort by a federal court to make prison life comparable to that outside the prison walls is contrary to these principles. The higher a court raises prisoner standards, the more detailed will be its commands. Once a court's order goes beyond basic human needs, the border between proper and improper is much more discretionary. A court will therefore have to give much more detailed commands so that its view of what is proper is implemented. This explains the extraordinary level of detail of the orders in some prisoner rights cases, such as *Ruiz* and the present case. See *ante*, at 9; *post*, at 18. *Ruiz* demonstrates that such burdensome detail can make the difficult job of running a prison intolerable. If left unchecked, the Ninth Circuit's decision in the present case will provide further proof.

C. Libraries, Litigation, and the Prison System.

The level of punishment imposed by a prison can be influenced by the access to courts accorded prisoners. This Court has recognized a prisoner's right to access to the courts. See *Bounds v. Smith*, 430 U. S. 817, 824 (1977). If this right is sufficiently extended, "meaningful access," see *ibid.*, becomes a subsidy to prisoner litigation, as the state is required to bear more and more of the prisoner's litigation burdens. This level of access is incompatible with the punitive needs of prison.

Subsidy to litigation undermines the prison system in many ways. Some prisoners use litigation to harass prison officials and extort favors from them. V. Fox, *Correctional Institutions* 77 (1983). Inmates have "essentially nothing left to lose, including time, by prosecuting such actions and they may gain something even if it is nothing but the satisfaction of harassing, inconveniencing, and annoying those who have them in charge." *Wycoff v. Brewer*, 572 F. 2d 1260, 1267 (CA8 1978). Thus litigation becomes a leisure activity for many prisoners. See Fox, *supra*, at 77. The reality of this conclusion is underscored by the fact that the overwhelming majority of prisoner-initiated litigation is spurious. See Doumar, *Prisoners' Civil Rights Suits: A Pompous Delusion*, 11 Geo. Mason L. Rev. 1, 18 (1988); see, e.g., *Lane v. Hutchison*, 794 F. Supp. 872, 882 (E.D. Mo. 1992) ("the brewing of coffee in a kettle instead of a coffee pot"); *Walker v. Goldsmith*, 902 F. 2d 16, 16 (CA9 1990) (Sixth Amendment right to venire members whose names begin with W, X, Y, or Z).

Less spurious litigation also undermines prison authorities. The threat of inmate suits makes prison authorities reluctant to administer punishment and makes prisoners more difficult to control.

"[T]he prisoners' rights movement has clearly affected prison life. It has politicized prisoners, and it has provoked a more militant inmate posture. . . . ¶ Because prison administrators are fearful of inmate suits, they are sometimes reluctant to enforce punishment. Prison guards have borne the brunt of administrative reluctance to punish. Not infrequently, guards report disciplinary violations only to have the violations revoked by the warden." Engel &

Rothman, *The Paradox of Prison Reform: Rehabilitation, Prisoner's Rights and Violence*, 7 Harv. J.L. & Pub. Pol'y. 413, 431 (1984).

The result is predictable:

"As the courts mandate changes in institutional policies, staff and inmates lose respect for the authority of the prison personnel. This limits the administrators' ability to run the prison effectively. The loss of authority, coupled with fear of litigation and negative media coverage, has caused a shift in the control that was historically reserved for prison administrators and further threatens the lives of inmates and guards. Daily, guards face the fear of being taken hostage or being assaulted." *Id.*, at 433.

Inmate litigation is also expensive. While many suits are dismissed at a relatively early stage, the unwillingness and inability of most prisoners to settle early leaves the task of screening cases to the courts, creating considerable administrative burdens.

"The demands of the prisoners frequently are unrealistically high and unlikely to succeed at all. They are often brought because the prisoner faces little or no expense in bringing them. Providing prisoners with free legal counsel for civil suits can only serve to increase their willingness to bring such suits." Doumar, *supra*, 11 Geo. Mason L. Rev., at 19.

One study estimated that these suits cost over 100 million dollars a year—over 10 percent of the total federal judicial budget at the time. See Hanson, *What Should be Done When Prisoners Want to Take the State to Court*, 70 Judicature 223, 225 (1987). Prisoner suits have grown like wildfire over the last two decades. Any expansion of this right will open the floodgates wider and further burden prison administration.

Raising prisoner access to the courts can also erode citizens' faith in the criminal justice system. Litigation is a very expensive and time-consuming ordeal for the ordinary law-abiding citizen. Many valid constitutional claims are too expensive for the average citizen to raise in court. See, e.g., *Powers v. Ohio*, 499 U. S. 400, 415 (1991); *Rose v. Mitchell*, 443 U. S. 545, 558 (1979). It thus takes a relatively small improvement in the

prisoners' ability to litigate to give them greater effective access to the courts than average citizens. See Part III C *post*, at 20-21.

Placing the prisoners' access above the law-abiding citizens' can only reinforce the public's impression that the prison system insufficiently punishes prisoners. See Curniden, *Hard Times*, 81 A.B.A. J. 72, 73 (July 1995). A further weakening of public confidence in our institutions is inevitable. Such a corrosion of society is a high price to pay for the dubious benefits of encouraging overwhelmingly frivolous litigation.

II. The right to libraries found in *Bounds v. Smith* is very limited.

The right to libraries found in *Bounds v. Smith*, 430 U. S. 817 (1977) needs careful handling. Excessive expenditures and judicial intrusion overburden the prisons and alienate society. See Part I C *ante*, at 11-13. For this reason, *Bounds* must be construed narrowly. Fortunately, such construction is consistent with this Court's prisoner rights decisions.

Bounds v. Smith, 430 U. S. 817 (1977) was a limited break from this Court's previous treatment of access to the courts. Prior authority primarily removed state barriers to prisoner litigation. Thus, prison officials could not prevent prisoners from filing federal habeas corpus petitions, *Ex parte Hull*, 312 U. S. 546, 549 (1941), states could not require indigent prisoners to pay for trial transcripts, *Griffin v. Illinois*, 351 U. S. 12, 20 (1956), or pay docket fees for appeals or habeas petitions, *Burns v. Ohio*, 360 U. S. 252, 257 (1959); *Smith v. Bennett*, 365 U. S. 708, 708-709 (1961), and states could not prohibit inmates from giving legal assistance to each other without the state providing some alternate form of assistance. *Johnson v. Avery*, 393 U. S. 483, 490 (1969).

One decision arguably required states to act positively to encourage litigation. In *Douglas v. California*, 372 U. S. 353, 357 (1963), this Court required states to provide indigent defendants with counsel for any appeal as of right from a conviction. *Douglas* dealt with a defense against an action initiated by the state; the appeal as of right is an inevitable, logical conclusion to the state-initiated criminal conviction. This

relationship between the appeal as of right and the trial limited *Douglas*. Discretionary appeals and habeas corpus were different from *Douglas* because they were further removed from the trial. See *Ross v. Moffitt*, 417 U. S. 600, 615-616 (1974); *Pennsylvania v. Finley*, 481 U. S. 551, 557 (1987).

Bounds placed a greater affirmative burden on the courts to aid inmate litigation than had previous decisions.⁵ This Court inferred from prior right to access cases that the state had an affirmative obligation to make sure that inmates had "meaningful access to the courts." *Bounds*, 430 U. S., at 824. Fulfilling this obligation required a state to provide its prisoners with a law library or an adequate substitute to assist inmates' legal research. *Id.*, at 828.

Although *Bounds* went beyond prior cases, its journey was short. It did not impose a right to general legal assistance. *Bounds* was justified by a perceived need to help prisoners seek "new trials, release from confinement, or vindication of fundamental civil rights." *Id.*, at 827. Thus the right to access was not concerned with general civil litigation; it only protected access to file civil rights claims or habeas corpus petitions. See *id.*, at 827-828. This limit was effectively mandated by precedent, as *Bounds* drew heavily from *Avery*, *supra*, and *Wolff v. McDonnell*, 418 U. S. 539 (1974), cases that dealt with access

5. The *Bounds* Court noted that its decision was "a reaffirmation of the result reached in *Younger v. Gilmore*" 430 U. S., at 828. That case is a two-sentence, per curiam opinion affirming a district court's decision to require a prison law library. *Younger v. Gilmore*, 404 U. S. 15 (1971).

In spite of this earlier decision, *Bounds* did make new law. It understood that "*Gilmore* is not a necessary element in the preceding analysis" in *Bounds* supporting the right to libraries. 430 U. S., at 828-829. The "precedential weight" of *Gilmore* that *Bounds* claimed to reinforce its decision was small. See *Metromedia, Inc. v. San Diego*, 453 U. S. 490, 500 (1981). *Gilmore* "made no pretense of containing any reasoning at all." *Bounds*, 430 U. S., at 837 (Rehnquist, J., dissenting). The opinion did not indicate what right it creates; it simply affirmed a lower court's decision with a bare citation to *Johnson v. Avery*, *supra*. The extensive reasoning it gave to support its position demonstrates that *Bounds* did break new ground.

to file habeas petitions and civil rights actions respectively. See *id.*, at 578-579.

The *Bounds* Court was motivated by a fear that, without the ability to do basic legal research, prisoners would not be able to protect their fundamental constitutional rights. *Bounds* gave access to file civil rights and habeas corpus actions "because they directly protect *our most valued rights*." 430 U. S., at 827 (emphasis added). The civil rights *Bounds* sought to protect were "fundamental." *Ibid.*

It is unlikely that there are any undiscovered fundamental rights. The rights revolution that started in the 1960's long ago unearthed what was truly fundamental. For habeas corpus cases, fundamental procedures are those "central to an accurate determination of innocence or guilt." *Teague v. Lane*, 489 U. S. 288, 313 (1989) (plurality). It is "unlikely that many such components of basic due process have yet to emerge." *Ibid.* With decades of floodstage prisoner rights litigation under the bridge, there is no reason to believe that prisoner rights law is any different.

It requires relatively little research to bring to a court's attention a claim that a fundamental right has been violated. These are "classic" examples of constitutional violations. See *ibid.*, quoting *Rose v. Lundy*, 455 U. S. 509, 544 (1982) (Stevens, J., dissenting). The classics of constitutional law are well-known and readily found through elementary research. Therefore, a very limited library can satisfy *Bounds*.

An extensive law library is only necessary to engage in innovative, groundbreaking litigation. Such innovation was not contemplated by *Bounds*. Indeed, *Teague*, by strictly limiting the retroactivity of new rules, precludes most innovation from federal habeas corpus. Compare 489 U. S., at 310, with *Bounds*, *supra*, 430 U. S., at 826, n. 14. *Bounds* does not license prisoners to engage in legal innovation.

Bounds was further limited by what this Court expected prisoners to do with their legal research right. The right to access was not a right to competent prosecution of the habeas corpus or civil rights action. If meaningful access meant placing prisoners on or near equal footing with their state opponents, then *Bounds* would have included a right to counsel; litigation is

too complicated for a nonattorney to pursue successfully. Cf. *Powell v. Alabama*, 287 U. S. 45, 69 (1932). While appointed counsel was sufficient to satisfy *Bounds*, it was not necessary. Access to an adequate library was all that was necessary. See *Bounds*, 430 U. S., at 830.

Bounds did not guarantee competent prosecution of the action—it simply gave the prisoner the tools to present basic claims to a court in a reasonable manner. Thus, “our main concern here is ‘protecting the ability of an inmate to prepare a petition or a complaint’” *Id.*, at 828, n. 17, quoting *Wolff*, *supra*, 418 U. S., at 576. Once the prisoner made a “meaningful initial presentation to a trial court,” *id.*, at 828 (emphasis added), the trial court would presumably winnow out the spurious petitions and try to find counsel for the few remaining adequate claims. *Bounds* meant no more than to give a prisoner’s claim a somewhat better chance of catching the trial court’s eye.

III. The Ninth Circuit’s decision violates *Bounds*.

Whatever may be the proper limits of *Bounds v. Smith*, 430 U. S. 817 (1977), the decision below exceeded them. Its contradiction of precedent, micromanagement of prisons, and lavish expansion of inmate prerequisites provide a textbook example of how not to decide an inmate rights suit.

A. Contradicting Precedent.

The most egregious error of the lower court was its direct contradiction of *Bounds*. The Ninth Circuit held that the ADOC must provide prisoners with both an adequate law library and extensive assistance in legal research and drafting. See *Casey v. Lewis*, 43 F. 3d 1261, 1270 (1994). *Bounds* never required prisons to provide both amenities. “We hold, therefore, that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.” 430 U. S., at 828 (emphasis added); *id.*, at 830, 832.

The Ninth Circuit justified its evasion of the *Bounds* disjunctive by focusing on *Bounds*’ declaration that access to the courts must be “meaningful.” See *id.*, at 822. From this, the Ninth Circuit inferred that the ADOC must provide legal assistance to functionally illiterate and non-English speaking prisoners in order to insure that these prisoners had meaningful access to the courts. *Casey*, 43 F. 3d, at 1267. The court below supported this position by stating that “[t]he reliance upon fellow prisoners who are not trained in the law simply does not suffice as an adequate substitute.” *Ibid.*

This facile rationalization ignores the context of the precedent it contradicts. The *Bounds* decision relied heavily on *Johnson v. Avery*, 393 U. S. 483 (1969). See *Bounds*, *supra*, 430 U. S., at 823-824. In *Avery*, this Court held that the state cannot prevent inmates from helping other prisoners file legal papers unless the prison provides some adequate substitute for legal assistance. 393 U. S., at 490. The *Avery* Court determined that barring “jail-house lawyers” would prevent the many poorly educated or illiterate prisoners from having proper access to the courts. See *id.*, at 487. Implicit in this assertion is the recognition that “writ-writers” can help get access for otherwise incapable prisoners.

Bounds’ guarantee of meaningful access must be read in this context. *Avery* demonstrated that this Court knew that many inmates were incapable of doing legal research and writing. Yet the *Bounds* Court had great faith in the legal capabilities of the more sophisticated prisoners. “More importantly, this Court’s experience indicates that pro se petitioners are capable of using lawbooks to file cases raising claims that are serious and legitimate” *Bounds*, 430 U. S., at 826-827. Thus the *Bounds* Court held that the right to meaningful access was satisfied through libraries alone; this Court implicitly recognized that “writ-writers” would give adequate help to the illiterate or ignorant. The decision below cannot stand in light of this reality.

B. Micromanagement.

One principle has remained constant through this Court’s prisoner rights jurisprudence—courts must defer to the expertise and discretion of prison administrators to manage their prisons.

See, e.g., *Sandin v. Conner*, 63 U. S. L. W. 4601, 4604 (slip op., at 9) (June 19, 1995); *O'Lone v. Estate of Shabazz*, 482 U. S. 342, 353 (1987); *Hewitt v. Helms*, 459 U. S. 460, 467 (1983); *Jones v. North Carolina Prisoners' Union*, 433 U. S. 119, 126 (1977); *Meachum v. Fano*, 427 U. S. 215, 225 (1976). The problems of running a prison are extraordinarily difficult, see *Hewitt, supra*, 459 U. S., at 467, and cannot be solved through judicial decree. See *Procunier v. Martinez*, 416 U. S. 396, 404-405 (1974). As courts are ill-equipped to run prisons, their administration must be left to the executive and legislative branches. See *Turner v. Safley*, 482 U. S. 78, 84-85 (1987). This is particularly important when federal courts are dealing with state prisons; federalist principles require even greater judicial deference. *Id.*, at 85.

The meticulously detailed relief ordered by the Ninth Circuit ignores these well-established rules. Instead of giving ADOC officials the necessarily broad discretion, the court below chose to pick such nits as the maximum mark-up for legal supplies available for purchase by prisoners, *Casey, supra*, 43 F. 3d, at 1280 (Appendix A),⁶ the types of supplies that must be available for sale, *ibid.*, the type and quantity of supplies provided to indigent prisoners, *id.*, at 1280-1281, the procedure and deadlines for processing a prisoner's request for supplies or services, *id.*, at 1281, the manner in which ADOC must advise staff that prisoner legal materials may not be read during photocopying, *id.*, at 1280, the qualifications for librarians, *id.*, at 1275, the noise level of libraries, *id.*, at 1276, the contents of forms for requesting legal assistance, *id.*, at 1274, the processing of these forms, *ibid.*, the selection number, training, and retention of legal assistants, *id.*, at 1276-1277, the legal training program for prisoners, *id.*, at 1277-1278, the times when the library must be open, *id.*, at 1273, and the manner in which the ADOC may limit a prisoner's access to the library. *Id.*, at 1272-1273. Even such a trivial decision as to which publisher's edition of the

6. Appendix A of the Court of Appeals decision consists of the injunction ordered by the District Court. See *id.*, at 1272. The Ninth Circuit affirmed all of the District Court's order discussed in Part III B of this brief. See *ante*, at 3, note 2, for what aspects of the District Court's order that were reversed by the Ninth Circuit.

U. S. Code to stock requires approval of the Court or Special Master. *Id.*, at 1276.

This is a dangerous precedent. Such detailed, intrusive oversight can be poisonous to a prison system by robbing administrators of the discretion to run safe and secure prisons. See *Hewitt, supra*, 459 U. S., at 467. This is why "the safe and efficient operation of a prison on a day-to-day basis has traditionally been entrusted to the expertise of prison officials" *Id.*, at 470.

No amount of judicial wisdom can equal the expertise gained through the actual running of a prison. See C. Cripe, Courts, Corrections, and the Constitution: A Practitioner's View, in *Courts, Corrections, and the Constitution* 268, 279 (J. DiIulio ed. 1990). The more detailed a court's orders are, the more its ignorance of prison life will be exposed. This can only add one more "Herculean obstacle" to the administrator's task. *Procunier, supra*, 416 U. S., at 405.

Legalistic detail has an even more dangerous effect. Close, demanding oversight of a prison by a court saps the authority needed to run the prison and administration. When the courts interfere with prison management through judicial decree, inmates doubt the authority of the staff, and the staff questions the ultimate authority of the prison administrators. See Feeley & Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature*, in *Courts, Corrections, and the Constitution, supra*, at 17. "This in turn leads to a decline in staff morale, an increase in staff turnover, and an increase in the unruliness of clientele groups." *Id.*, at 17-18. The closer the judicial scrutiny, the worse this problem will become. Thus federal courts must not be allowed to be seen as the managers of prisons.

"[T]he involvement of federal courts in the day-to-day management of prisons" simply squanders "judicial resources with little offsetting benefit to anyone." *Sandin, supra*, 63 U. S. L. W., at 4604. The Ninth Circuit has engaged in precisely the form of micromanagement most recently condemned in *Sandin*. It is time for this Court to unshackle the ADOC and give them the discretion they need.

C. Extreme Accommodation.

The final mistake of the Ninth Circuit was its extreme accommodation of prisoner interests. These privileges give prisoners greater access to a variety of legal resources than law-abiding citizens. Such lavishness is contrary to the core beliefs that motivate our criminal justice system. See Part I C *ante*, at 11-13.

One example of the Ninth Circuit's excessive generosity is the library hours it mandates. Except for university libraries, which are usually not open to the public, it is extremely rare for a library to be open 60-80 hours a week, let alone be open until 9:00 or 10:00 p.m. See *Casey*, *supra*, 43 F. 3d, at 1273, ¶ B.1.b. The Ninth Circuit has given Arizona prisoners easier and more convenient library access than law-abiding citizens.

The exceptional level of legal assistance given to prisoners is another luxury foreign to most private citizens. Prisoners are entitled to trained law clerks, *id.*, at 1274-1275, and either attorneys, paralegals, or extensively trained legal assistants. *Id.*, at 1276-1277. At least some of these assistants must be bilingual. *Id.*, at 1277. The Ninth Circuit attempts to justify its largesse by noting that "the restrictions on a prisoner's liberty attendant to imprisonment prevents the prisoner from enlisting the assistance of his family, friends, and a myriad of social services and legal aid organizations that would otherwise be available." *Id.*, at 1268.

This grossly overestimates the availability of resources to the average citizen. The overwhelming majority of "family and friends" have no training in the law.⁷ The present case demonstrates that prisoners already receive the help of "a myriad of social services." The prisoners in the present case have been represented by the National Prison Project of the ACLU, a well-known "social service organization."

For the most part, law-abiding citizens do not receive this level of assistance. Some of the poorest may get some help from legal aid programs—most will be left to their own resources.

7. Counsel for *amicus* frequently encounters hopelessly lost citizens attempting *pro per* legal research at the California State Law Library.

Because most jurisdictions grant attorneys cartel power over providing legal services, see Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 Stan. L. Rev. 1, 4 & n. 7 (1981), private citizens will not be able to rely on the relatively inexpensive legal assistants given to the prisoners by the Ninth Circuit. Those outside prison will have to go it alone, or incur the often prohibitive expense of private counsel. See *id.*, at 98. The Ninth Circuit has thus given prisoners a luxury most of the law-abiding public cannot afford.

Imprisonment should not create new privileges for the prisoner. Prison is about the loss of rights and privileges. See *Hudson v. Palmer*, 468 U. S. 517, 524 (1984); *Rhodes v. Chapman*, 452 U. S. 337, 347 (1981). The Ninth Circuit broke this covenant with the public by granting prisoners a litigation subsidy more extensive than anything given to the average citizen. Our criminal justice system cannot abide such unearned luxuries. See Part I A *ante*, at 5-8.

D. The Logical Conclusion.

Taking the Ninth Circuit's reasoning to its logical conclusion would require states to provide full-time counsel for its prisoners. As noted earlier, the *Bounds* Court knew that many prisoners were incapable of doing legal work on their own, yet it required only that states provide prisoners with libraries and no other legal assistance. See *ante*, at 17. The Ninth Circuit's expansion of "meaningful assistance" to include legal aid must be read in this context.

Bounds was not so concerned about the prisoners prosecuting their litigation successfully; it merely wanted to insure that prisoners could present their serious claims to the District Court. See *Bounds v. Smith*, 430 U. S. 817, 828 & n. 17 (1977). The Ninth Circuit was much more concerned with helping prisoners better prosecute their actions.

In noting the advantages of the legal assistance program, the court below stated that such assistance would lead to: "more efficient and skillful handling of prisoner cases, the avoidance of disciplinary problems associated with writ writers, and the mediation of many prisoner complaints that would otherwise

burden the courts.” *Casey v. Lewis*, 43 F. 3d 1261, 1268 (CA9 1994).⁸ Such reasoning leads down the slippery slope of a general right to counsel. The Ninth Circuit’s comment about relieving its own burden, *id.*, at 1268, n. 6, is especially disturbing. The Constitution does not authorize the federal judiciary to impose a financial burden on a state’s taxpayers for the mere purpose of easing its own staffing problems.

If courts are serious about making prisoners effective litigators, as the Ninth Circuit is, then prisoners must be given a right to appointed counsel. No amount of help from paralegals or legal assistants will enable a lay prisoner to represent himself nearly as competently as could an attorney. The attorney’s knowledge, training, and experience provide a near-overwhelming edge over the frequently ignorant and ill-educated prisoner. See *Powell v. Alabama*, 287 U. S. 45, 69 (1932). The actions protected by *Bounds* are no less complicated than the criminal trial in *Powell*. Habeas corpus is one of the most complex areas of the law. As one judge noted, “[h]abeas corpus is as unfamiliar to a lot of lawyers as atomic physics.” Godbold, Pro Bono Representation of Death Sentenced Inmates, 42 Rec. AB City N.Y. 859, 863 (1987). Taken to its logical conclusion, the Ninth Circuit’s definition of meaningful access would require states to provide counsel to guide prisoners through this thicket.

This goes far beyond what this Court has been willing to give prisoners. In *Pennsylvania v. Finley*, 481 U. S. 551 (1987), this Court explicitly refused to give prisoners such expansive rights. “We have never held that prisoners have a constitutional right to counsel when mounting attacks upon their convictions [citation], and we decline to so hold today.” *Id.*, at 555. The states are not required “to duplicate the legal arsenal that may be privately retained . . . but only to insure the indigent defendant an adequate opportunity to present his claims fairly” *Id.*, at

8. As the court below noted, *Bounds* made similar claims in support of giving prisoners a legal assistance program. See *Bounds*, *supra*, 430 U. S., at 831. But this was merely an “alternative” to the adequate remedy of law libraries. *Id.*, at 830. More importantly, the same passage touting the advantages of assistance programs contemplates serving the legal needs of prisoners through a nationwide staff of lawyers. *Id.*, at 831-832.

556, quoting *Ross v. Moffitt*, 417 U. S. 600, 616 (1974). The court below has started down a road that will lead to placing this type of burden on the states. It is up to this Court to put the Ninth Circuit back on the right track.

IV. *Bounds* needs to be clarified.

Bounds v. Smith, 430 U. S. 817 (1977) needs clarifying. The confusion in the lower courts over whether meaningful access requires both a library and legal assistance, compare *Hooks v. Wainwright*, 775 F. 2d 1433, 1436-1437 (CA11 1985), with *Casey v. Lewis*, 43 F. 3d 1261, 1267-1268 (CA9 1994), demonstrates that *Bounds* has some tensions that need to be resolved. Furthermore, the decision below shows a broad misunderstanding of what *Bounds* means. See Part III *ante*, at 16-23. Clarifying *Bounds* should limit future misinterpretation.

This Court should therefore make clear that *Bounds*’ guarantee of meaningful access, see 430 U. S., at 828, is very limited. The term “meaningful” cannot drive the decision. Meaningful access does not mean a guarantee of the ability to conduct effective litigation or push the envelope of legal theory. Such a guarantee would place an intolerable burden on the states, eventually requiring them to supply prisoners with counsel. See Part III D *ante*, at 21-23. This is far beyond what this Court has been willing to compel states to give prisoners. See *Pennsylvania v. Finley*, 481 U. S. 551, 556-557 (1987).

Instead, meaningful access means giving the prisoners the tools to present fundamental civil rights and habeas claims to the trial court.⁹ The *Bounds* Court had great confidence that prisoners could make adequate use of law libraries. See 430 U. S., at 827. This assessment is informed by the inevitable presence of “writ writers” in every prison who will help fashion petitions for those who cannot do so themselves. See Part III A *ante*, at 17. States must only give prisoners the tools to sue

9. Odd as it may sound to refer to nonfundamental constitutional rights, such rights do exist in the case law, whether or not they are really in the Constitution. See *Rose v. Lundy*, 455 U. S. 509, 543, n. 8 (1982) (Stevens, J., dissenting).

them; they need not show prisoners the best avenues of attack. Thus *Bounds* is satisfied by providing prisoners with a library that will let them bring fundamental claims to the attention of a court.

This Court should also reiterate the deference owed to the decisions of prison administrators in fulfilling *Bounds*. This Court has noted in other contexts that the decisions of prison administrators are owed considerable deference. See, *ante*, at 17. A clear statement that the Ninth Circuit's micromanagement of prisons is improper is once again necessary. Cf. *Sandin v. Conner*, 63 U. S. L. W. 4601, 4604 (June 19, 1995).

This means that the lower courts should keep their scrutiny of state prisons to a minimum. What relief courts can order should be in the form of broad goals, with the details left to the discretion of prison administrators. Only after an affirmative showing of an administrator's lack of good faith should a court intervene in the details of running the prison.

Bounds provides an example of this deference. Once the District Court found that North Carolina had to provide a prison library, it let the state come up with its own plan for implementing the order. See *Bounds*, *supra*, 430 U. S., at 818-819. This plan was affirmed by the District Court with only minor adjustments. See *id.*, at 820, n. 6. The Court of Appeal affirmed with a similarly light touch. See *id.*, at 820. This Court did not intrude on North Carolina's exercise of discretion. While it questioned some of the library choices, see *id.*, at 819-820, n. 4, it upheld North Carolina's minimally changed plan. See *id.*, at 833.

Federalism places important constraints upon a federal court's involvement with prison management. See *Turner v. Safley*, 482 U. S. 78, 85 (1987). When a federal court attempts to set the prices of prison legal supplies, see *ante*, at 18, it affronts the dignity of both the state of Arizona and the federal courts. Perhaps most importantly, the appointment of a Special Master to peer majestically over the prison administrator's shoulder, cf. *Lewis v. Jeffers*, 497 U. S. 764, 780 (1990) should be clearly designated a drastic measure to be taken only in extreme circumstances. The judicial takeover of an executive function, and a state one at that, strikes at the heart of both

federalism and the separation of powers. This Court must put an end to it.

Lacking both the sword and the purse, courts were supposed to be the least dangerous branch of government. See *The Federalist* No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton). This should be particularly true in prisoner rights cases. The ecology of a prison is delicate; too much change can be dangerously disruptive to the prison's balance of power. See C. Cripe, *Courts, Corrections, and the Constitution: A Practitioner's View*, in *Courts, Corrections, and the Constitution* 268, 276-277 (J. DiIulio ed. 1990). As this Court understands, "the problems of prisons in America are complex and intractable and, more to the point, they are not readily susceptible to resolution by decree." *Procunier v. Martinez*, 416 U. S. 396, 404-405 (1974).

Prisons were once deteriorating national disgraces. Then a nationwide group of dedicated reformers fixed the bulk of these problems. One might think that it was federal judges that led this change for reform. But that would be wrong. America's prisons were not cleaned up by the federal judiciary, but by a host of prison administrators between 1940 and 1970. J. DiIulio, *No Escape* 150 (1991). These landmark reforms made vast improvements in the lives of prisoners well before the prisoner rights revolution of the 1970's:

"One might suppose that judges began to intervene in penal administration in the 1970s because, relative to previous decades, prison and jail conditions were deteriorating. In fact, however, just the opposite is true: Judges started to act as wardens at a moment when, throughout most of the country, prison and jail conditions were no worse than before—in fact, in most cases they were demonstrably better." *Ibid.*

While it is impossible to turn back the clock and put the genie of prison litigation back in the bottle, this Court can limit future abuses. It is not the prisoner who needs protection from the prison anymore; now it is the prison that this Court must protect from overzealous federal judges.

CONCLUSION

The decision of the Ninth Circuit should be reversed.

August, 1995

Respectfully submitted,

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Supreme Court, U.S.

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Supreme Court of the United States

October Term, 1995

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Petitioners,

v.

FLETCHER CASEY, JR., *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTION PRESENTED

Does the district court's order in this "access to courts" case, which greatly expands the State of Arizona's financial and administrative burdens and shifts much of the management of the state's prison system to the federal judiciary, exceed the constitutional requirements set forth in *Bounds v. Smith*, 430 U.S. 817 (1977)?

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INTEREST OF THE AMICI CURIAE

This brief in support of the Petitioners, prison officials of the Arizona Department of Corrections, is submitted on behalf of the State of California and the other signature States ("the Amici States") through their Attorneys General pursuant to Supreme Court Rule 37.5. The Amici States have an important interest in this case because they all operate correctional facilities in which they must assist the persons whom they incarcerate in obtaining access to courts.

The fundamental constitutional right at issue in this case is the right of access to courts. "[T]he fundamental right of access to courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds v. Smith*, 430 U.S. 817, 828 (1977). Under *Bounds*, the constitutional right of access requires a state to provide a law library or legal assistance only during the pleading stage of a habeas or civil rights action.

Seizing upon the term "meaningful," and ignoring the limited scope and duration of prison authorities' duty to assist prisoners, the Court of Appeals for the Ninth Circuit has affirmed an order of the District Court of Arizona which dramatically expands the physical access to law libraries that states must allow prisoners, the legal materials they must be provided, and the legal assistance which must be available to all prisoners, even prisoners who have physical access to a law library. *Casey v. Lewis*, 43 F.3d 1261 (9th Cir. 1994).

Nothing in the order affirmed by the Ninth Circuit is necessary to remedy any violation of the constitutional

right described in *Bounds*. The Amici States seek an opinion from this Court which clarifies the limits on their duties under the Constitution so that lower courts might avoid immersion in the details of prison administration under the guise of providing "meaningful" access to courts.

SUMMARY OF ARGUMENT

Pursuant to this Court's decision in *Bounds v. Smith*, 430 U.S. at 825-828, a constitutional right of access to courts requires a state to provide legal materials or legal assistance only during the pleading stage of a habeas corpus or civil rights action. The court of appeals disregarded established limitations on the scope of the constitutional right as well as limitations on the scope of relief which may be imposed to protect the right. The lower courts in this case disregarded the limited nature of the duty owed by state officials. This disregard infects each provision of injunctive relief ordered and affirmed. Indeed, the error is compounded because the decision below would impose both excessive library access and excessive legal assistance.

The scope of injunctive relief must be no broader than necessary to remedy a constitutional violation. The Ninth Circuit did not heed this standard when reviewing the injunctive relief ordered by the district court. Instead it affirmed the injunctive relief upon findings that the remedies ordered by the district court were merely "reasonable" or "not unreasonable." Therefore it failed to constrain itself to consider whether the relief ordered was

necessary to protect the constitutional right described and circumscribed in *Bounds*. This led the court of appeals to affirm an order that was both too expansive in scope and so specific that it results in micro-management of the prisons. Had the court of appeals reviewed the injunction under the proper standard, it would have been compelled to reject it in its entirety.

Federal courts are limited in their power to order injunctive relief against the states to those remedies necessary to cure a constitutional violation. This Court has stressed the deference owed to prison officials in the operation and management of prisons. Moreover, the duty of prison officials to assist inmates in the preparation and filing of petitions and complaints is at best loosely anchored in the Constitution. These factors, alone and in combination, counsel in favor of great restraint when a federal court reviews the adequacy of the law library or legal assistance provided by state prison officials or imposes any remedy.

ARGUMENT

NONE OF THE REQUIREMENTS AFFIRMED BY THE COURT OF APPEALS IS NECESSARY TO PROTECT PRISONERS' ACCESS TO COURTS

A. The Proper Standard of Review

This Court recently reaffirmed "the bedrock principle that 'federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation.'" *Missouri v. Jenkins*, ___ U.S. ___, 115 S.Ct.

2038, 2054 (1995), quoting *Milliken v. Bradley*, 433 U.S. 267, 282 (1977). It also "emphasized that 'federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs consistent with the Constitution.' [citation omitted]." *Id.* Moreover, "[i]njunctive relief must be no broader than necessary to remedy the constitutional violation." *Toussaint v. McCarthy*, 801 F.2d 1080, 1086 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987), citing *Milliken*, 433 U.S. at 280. These admonitions have been too often forgotten by the federal courts in the use of "structural injunctions" to manage state prisons. *Jenkins*, 115 S.Ct. at 2067 (Thomas, J., conc.) Perhaps nowhere is the interest of the states greater and the deference to be given to prison officials by the federal courts stronger than in the administration of this nation's prisons. *Turner v. Safley*, 482 U.S. 78, 89 (1987); *Bell v. Wolfish*, 441 U.S. 520, 550 (1979).

A critically important point overlooked by the court of appeals is that the federal courts may only evaluate the reasonableness of a prison regulation if it "impinges on inmates' constitutional rights. . . ." *Turner*, 482 U.S. at 89. The amici states agree with petitioner that if any of Arizona's regulations or policies impinge upon the prisoners' right of access to courts, then evaluation under the deferential standard set forth in *Turner* is appropriate. Since amici contend, however, that all of the policies and procedures in this case are constitutional under *Bounds*, the Court need not engage in the analysis required when prison officials infringe upon an inmate's constitutional rights.

After giving token recognition to the above tests of constitutionality and necessity, the court of appeals actually applied tests of judicial discretion and reasonableness. This is fundamental error in two significant ways. First, because Arizona was in compliance with the constitutional demands as set forth in *Bounds*, there was no need to evaluate the reasonableness of any infringement of prisoners' constitutional rights. Second, assuming *arguendo* that any policy or procedure in Arizona may have impinged on a constitutional right, *Turner* instructs that the federal courts are to evaluate the reasonableness of the *prison officials'* actions. Rather than following *Turner*, the court of appeals gave no deference to the judgment of prison officials, but instead evaluated only the reasonableness of the *district court's* remedies.

In essence, the court of appeals erroneously took far too broad a view of the equitable powers of a federal court. As set forth below, it read *Bounds* far too expansively to find constitutional violations where none existed. It then evaluated the relief ordered by the district court either under an improper standard or under no standard at all. This led the court to affirm relief which was beyond the jurisdiction of the federal courts.

In reviewing the additional legal materials that prison officials were ordered to provide and the required training for library staff, the Ninth Circuit found either that the relief was "reasonable" or "not unreasonable." *Casey*, 43 F.3d at 1270-71. It affirmed the extension of hours of operation of the law libraries based on its finding that the required hours did not "constitute 'unlimited access.' [citation omitted]." *Id.* at 1271. It required the showing of training video tapes on the bases that these

tapes would help make the library accessible to inmates and that defendants failed to show any hardship from making the tapes available. *Id.* It upheld the requirement that prisoners be allowed at least three twenty-minute telephone calls per week to their attorneys because the Arizona Department of Corrections could implement the measure with little cost and it could potentially save staff time otherwise spent on screening out non-emergency calls. *Id.* at 1272. In no instance did the Ninth Circuit ever find that the relief was necessary to remedy a constitutional violation. Had the Ninth Circuit reviewed the injunctive relief ordered by the district court under this standard it would have been compelled to reverse each and every part of the injunction.

B. Limitations on the Duty to Assist Prisoners in the Filing of Habeas Corpus and Civil Rights Actions and the Scope of Injunctive Relief

For at least two reasons, this Court should speak definitively to limit *Bounds* to its original terms: First, the constitutional underpinnings of the *Bounds* duty to assist are questionable. See *Bounds*, 430 U.S. at 834-835 (Burger, C.J., dissenting), 836-837 (Stewart, J., dissenting), 837-841 (Rehnquist, J., dissenting); see also, *Murray v. Giarratano*, 492 U.S. 1, 11 and n.6 (1989). Second, the federal courts must tread very carefully in ordering changes in prison operations to accommodate the right of access to courts.

Prison officials have no constitutional duty under *Bounds* to provide legal assistance for any purpose other than to initiate a civil rights or habeas corpus action. Accordingly this Court should clarify that not only did

the injunctive relief ordered and affirmed in this case exceed constitutional requirements, but Arizona already exceeded the requirements of *Bounds* in every regard prior to the entry of injunctive relief.

If prison officials provide inmates with legal materials or legal assistance adequate for the filing of a petition or complaint, no constitutional violation exists. In the absence of a constitutional violation, no remedy may be imposed against the prison officials. The Constitution does not require prison officials to provide inmates with well-stocked law libraries, direct physical access to libraries, countless hours to draft factual pleadings in a library or the assistance of trained legal personnel if administrators choose to provide access to library materials. Accordingly, the decision of the Ninth Circuit should be reversed.

C. The Limited Scope and Duration of The Duty to Assist

Under *Bounds*, "the constitutional right of access requires a state to provide a law library or legal assistance only during the pleading stage of a habeas or civil rights action." *Cornett v. Donovan*, 51 F.3d 894, 898 (9th Cir. 1995). This Court's opinion in *Bounds* states repeatedly that the right of access to courts encompasses only the filing of habeas corpus petitions and civil rights complaints. See *Bounds v. Smith*, 430 U.S. at 823 (discussing holding in *Johnson v. Avery*, 393 U.S. 483, 489 (1969) that ban on inmate assistance effectively prevented some prisoners from preparing petitions to challenge legality of their confinement and extension of that holding to civil

rights actions in *Wolff v. McDonnell*, 418 U.S. 539, 577-580 (1974)); 825 ("inquiry is rather whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts" and discussion of basic requirements for filing of habeas corpus petition or civil rights complaint); 827 ("in this case, we are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights" and emphasizing that "habeas corpus and civil rights actions are of 'fundamental importance . . . in our constitutional scheme . . . '"); 828 n.17 ("our main concern here is 'protecting the ability of an inmate to prepare a petition or complaint.' "). Thus, this Court has only compelled the states to provide assistance to prisoners in two limited areas of law – civil rights complaints and habeas corpus petitions – and it has limited the duration for which assistance must be provided.

While the narrow scope of the right of access now seems clear, its practical meaning has been anything but clear in the lower courts. Indeed, the decision of the Ninth Circuit in *Cornett* cites the opinion in the present case as consistent with the rule that access is required only for the filing of a habeas or civil rights action. *Cornett*, 51 F.3d at 900, citing *Casey*, 43 F.3d at 1268. In fact, however, the court of appeals in this case affirmed an injunction which both implicitly and explicitly presumes a much broader scope of the duty to assist. E.g., *Casey*, 43 F.3d at 1277 (injunction requires videotape training in relevant tort and civil law, including immigration and family issues). This and other clear errors would not

have occurred had the court of appeals obeyed the limits set by this Court in *Bounds*.

Both habeas corpus and civil rights pleadings are essentially fact based. *Bounds*, 430 U.S. at 825; see, Rules Foll. § 2254. Prisoner *pro se* papers are liberally construed. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Although the liberal standards for prisoner pleadings do not obviate the need to provide prisoners with law libraries or legal assistance, *Bounds*, 430 U.S. at 825-826, these standards should nevertheless be considered to confine the scope of what duty prison officials owe prisoners as a matter of constitutional necessity.

D. Specific Injunctive Relief

Reviewing the scope of the injunctive relief affirmed by the court of appeals, it is clear that it is excessive in every regard. The most basic error which pervades the entire injunction is the lower courts' conjunction of access to a law library with legal assistance. This is flatly inconsistent with this Court's holding "that the fundamental constitutional right of access to courts requires prison officials to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries *or* adequate assistance from persons trained in the law," *Bounds*, 430 U.S. 828 (emphasis added). The court of appeals' holding that meaningful access requires both adequate law libraries *and* legal assistance, *Casey*, 43 F.2d at 1270, must be reversed.¹

¹ To the extent that the court of appeals based its deviation from this Court's holding in *Bounds* on its finding that some

The Ninth Circuit also erred when it affirmed the order requiring Arizona to provide regional reporters and digests in prison law libraries. Arizona already provides a library far in excess of that required for an inmate to file a civil rights or habeas corpus action. As noted by petitioner, each library is stocked at a minimum with the following materials: United States Code Annotated, Supreme Court Reporter, Federal Reporter (Second), Federal Supplements, Shepard's U.S. Citations, Shepard's Federal Citations, Local Rules for the Federal District Court, Modern Federal Practice Digest, Federal Practice Digest (Second), Arizona Code Annotated, Arizona Reports, Shepard's Arizona Citations, Arizona Appeals Reports, Arizona Rules of Evidence (Udall), ADC Policy Manual, 108 Institutional Management Proceedings, Federal Practice and Procedures (Wright), Corpus Juris Secundum, and Arizona Digests. Pet. App. B at 32a-33a. Petitioner noted that some of the libraries also included prisoner self-help manuals. Pet. App. B. at 34a.

prisoners are poorly educated or do not speak English, *Casey*, 43 F.3d at 1270, these facts are so obvious that "[i]t presses credulity to contend" that this Court's decision in *Bounds* would have been different if it had recognized that some inmates might have difficulty using a law library. *Hooks v. Wainwright*, 775 F.2d 1433, 1436 (11th Cir. 1985), *cert. denied*, 479 U.S. 913 (1986). The court of appeals also appeared to base the requirement of legal assistance on its belief that skilled legal assistants might reduce the burden on the courts. *Casey*, 43 F.3d at 1268 and n.6. Not only is this an entirely inappropriate consideration in determining the existence of a constitutional violation or the need for a remedy, it is a tacit acknowledgment by the court of appeals that inmates are not having any difficulty gaining access to the courts.

The Ninth Circuit simply found that the order to provide regional case reporters and other materials was "reasonable." *Casey*, 43 F.3d at 1270-71. The court of appeals did not find that these materials were necessary for court access under *Bounds*, nor did it find that the materials already in the library were insufficient to prepare a civil rights complaint or habeas corpus petition. Amici submit that this Court should recognize that the materials in the Arizona law libraries exceed the minimum required under *Bounds*, and conclude that there is no constitutional basis for ordering Arizona to do more.

The court of appeals committed clear error when it affirmed the sections of the injunction in which the district court ordered direct physical access to the law library for all inmates, regardless of the potential security risk posed by some maximum security inmates. *Casey*, 43 F.3d at 1271. It then erroneously affirmed the ruling that once in the library inmates must also be permitted to browse in the stacks in search of " 'a chance discovery of an obscure or forgotten case.' " *Id.*, at 1267, quoting *Toussaint v. McCarthy*, 801 F.2d at 1110. In addition the court of appeals erroneously affirmed a requirement that the libraries must be open at least fifty hours per week to serve the needs of the Arizona prison population. *Id.* at 1271.²

² Using the formula devised by the district court for hours of operation at facilities which require an advance request for library use, California estimates that given the size of its prison facilities the libraries would have to remain open 24 hours per day for five days per week to satisfy the order approved in this case.

Once again, these requirements are far in excess of those necessary to satisfy the fundamental constitutional right at issue in *Bounds*. It is well established that a prisoner's right of access to court does not include a right to appear personally in the court house. *Holt v. Pitts*, 619 F.2d 558, 560-561 (6th Cir. 1980); *Ballard v. Spradley*, 557 F.2d 476, 480 (5th Cir. 1977); *Matter of Warden of Wisconsin State Prison*, 541 F.2d 177, 180-181 (7th Cir. 1976); *McKinney v. Boyle*, 447 F.2d 1091, 1094 (9th Cir. 1971). By the same token, the right of access to a law library need only encompass the right to reasonable use of legal materials. Direct physical access to a library is not necessary to protect the right of access to court.

As the Court acknowledged in *Bounds*, a habeas corpus petition or a civil rights complaint need only set forth facts. *Bounds*, 430 U.S. at 825. Therefore most of the drafting of the petition or complaint can be done in the inmate's cell or any other location where the prisoner has available to him the materials necessary to draft his pleading. To the extent that the prisoner requires the use of a law library to assist him in the drafting of his pleading, the institution must make available to him the necessary materials. There is nothing of any constitutional significance about the building in which the prison chooses to house its collection of law books. An exact-cite paging system, or any other system that ensures that prisoners have the opportunity to use the materials in the law library, suffices to satisfy prison administrators' duty under *Bounds*.

Finally, there is simply no constitutional basis for the holding that the right of access to court requires prison

officials to provide inmates with telephone calls to lawyers. Since Arizona has chosen to provide inmates with access to law libraries there is no further right to legal assistance. Therefore, there was no need for the court of appeals to engage in further discussion of the method by which Arizona must provide access to lawyers.

Moreover, in *Bounds*, this Court carefully worded its holding that an alternative to providing prisoners with an adequate law library would be to provide them with "adequate assistance from persons trained in the law." *Bounds*, 430 U.S. at 828. The Constitution does not require that inmates be provided with lawyers. See, *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 854 (9th Cir. 1985); *Hooks v. Wainwright*, 775 F.2d at 1437. Alternatives to attorneys include "the training of inmates as paralegal assistants to work under lawyers' supervision [and] the use of paraprofessionals and law students. . . ." *Bounds*, 430 U.S. at 831. This Court stressed that "a legal access program need not include any particular element we have discussed . . .," and it expressly upheld the court order in *Bounds* because it left prison officials with "wide discretion." *Id.* at 832-833. Since prison officials cannot be compelled under the Constitution to provide inmates with lawyers, it follows that they cannot be compelled to provide prisoners with telephone calls to lawyers.

Amici recognize that, in some civil rights or habeas cases, prisoners will be represented by counsel who have been retained by the inmate or appointed by the court under other provisions of the law. Consistent with this Court's recognition in *Bounds* of the discretion which necessarily remains with prison officials, federal courts should not prescribe any method through which inmates

may discuss their case with counsel. A regulation which limits contacts to face-to-face meetings or to correspondence is facially valid. There is no basis upon which this Court could conclude that telephone calls to lawyers are necessary to protect the constitutional right of access to courts.

◆

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, the decision of the Ninth Circuit should be reversed, and prison officials should only be required to provide prisoners with the minimum resources required for the initial filing of a civil rights complaint or a habeas corpus petition.

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October Term, 1995

—◆—
SAMUEL LEWIS, et al.,

Petitioners,

v.

FLETCHER CASEY, JR., et al.,

Respondents.

—◆—
On Writ Of Certiorari To The United States Court
Of Appeals For The Ninth Circuit
—◆—

BRIEF OF *AMICI CURIAE* THE MEXICAN
AMERICAN LEGAL DEFENSE AND EDUCATIONAL
FUND, THE PUERTO RICAN LEGAL DEFENSE
AND EDUCATION FUND, and THE NATIONAL
ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM
IN SUPPORT OF RESPONDENTS
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No. 94-1511

In The
Supreme Court of the United States
October Term, 1995

SAMUEL LEWIS, et al.,

v.

Petitioners,

FLETCHER CASEY, JR., et al.,

Respondents.

On Writ Of Certiorari To The United States Court
Of Appeals For The Ninth Circuit

**BRIEF OF AMICI CURIAE THE MEXICAN
AMERICAN LEGAL DEFENSE AND EDUCATIONAL
FUND, THE PUERTO RICAN LEGAL DEFENSE
AND EDUCATION FUND, and THE NATIONAL
ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM
IN SUPPORT OF RESPONDENTS**

The above-mentioned *amici curiae* respectfully submit this brief in support of affirmance of the judgment below of the United States Court of Appeals for the Ninth Circuit. Pursuant to Rule 37.2, all parties to this action have consented in writing to the above-mentioned *amici curiae* participating in this matter.

INTEREST OF AMICI CURIAE

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national non-profit civil

rights organization with principal offices located in Los Angeles, California. MALDEF's chief objective is to advance and protect the rights of Latinos living throughout the United States, through activities such as litigation and public education.

The Puerto Rican Legal Defense and Education Fund ("PRLDEF") is a national non-profit civil rights organization with principal offices located in New York, New York. PRLDEF's principal objective is to advance and protect the rights of Latinos living throughout the United States, through activities such as litigation and public education.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit organization whose affiliates are the Asian Law Caucus, located in San Francisco, California, the Asian Pacific American Legal Center, located in Los Angeles, California, and the Asian American Legal Defense Fund, located in New York, New York. NAPALC's mission is to advance and protect the legal and civil rights of the nation's 7.3 million Asian Pacific Americans through litigation, advocacy, public education, and public policy development.

SUMMARY OF THE ARGUMENT

This brief is submitted on behalf of the above-mentioned *amici curiae* in support of affirmance of the judgment of the Ninth Circuit Court of Appeals. The above *amici* submit this brief in support of the broad position advanced by the Respondents, but will confine their arguments to the specific question of whether the Ninth

Circuit should be affirmed as to its holding that the Arizona prison system failed to provide "meaningful access to the courts" to non-English-speaking inmates.

The necessity of erecting and operating prisons in a well-ordered society carries with it certain obligations when that society calls itself a constitutional democracy interested in protecting citizens from unlawful deprivations of liberty. Since at least 1941, the Court has consistently held that among these obligations is the duty to provide inmates with open and meaningful access to the judicial system. *See Ex parte Hull*, 312 U.S. 546 (1941). This obligation includes not only the duty to refrain from hindering an inmate's access to the courthouse doors, *see, e.g., Burns v. Ohio*, 360 U.S. 252 (1959), but also certain affirmative duties to enable prisoners to prepare and file minimally adequate writs and other pleadings. *See Bounds v. Smith*, 430 U.S. 817 (1977).

With an awareness of the impediments prisoners face in presenting proper claims to the courts for consideration, the Court in *Bounds* made clear that prisons must take affirmative steps to ensure that a prisoner's access to the courts is no less meaningful than the access of those who live beyond the prison walls. Thus, the Court laid down the now-settled rule that in order to protect an inmate's "fundamental constitutional right of access to the courts," prisons must at a minimum either "provid[e] prisoners with adequate law libraries" or furnish inmates with "adequate assistance from persons trained in the law." *Bounds*, 430 U.S. at 829.

In cases involving inmates who neither speak nor read English, the Circuit Courts have unanimously interpreted *Bounds* as requiring prisons to do more than merely supply books to them, for the obvious reason that "[a] book and a library are of no use, in and of themselves, to a prisoner who cannot read." *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 855-56 (9th Cir. 1985). Since *Bounds* guarantees every inmate access to the courts that is meaningful, a prison's obligations to non-English-speaking inmates cannot be satisfied when it provides them with physical access to books they cannot read. Thus, the Circuit Courts have unanimously concluded that for these inmates, prisons must ensure reasonable access to individuals capable of either rendering the law library useful to them, or assisting them directly in preparing legal documents. See, e.g., *Knop v. Johnson*, 977 F.2d 996 (6th Cir. 1992); *Valentine v. Beyer*, 850 F.2d 951 (3d Cir. 1988); *Battle v. Anderson*, 614 F.2d 251, 255 (10th Cir. 1980).

In this case, the Petitioners urge the Court to sweep away this sensible and appropriate precedent, without providing any good reason for doing so. Petitioners seek this result, first, by grossly mischaracterizing the factual findings that undergird the conclusion below that Arizona's prison system failed to meet the threshold of "meaningful access" under *Bounds*. For example, Petitioners repeatedly assert that Arizona's non-English-speaking inmates "have physical access to excellent libraries *plus* help from legal assistants and law clerks." (Pet. Brf. at 35.) However, the District Court's conclusion that non-English-speaking inmates were denied "meaningful access" under *Bounds* is couched upon precisely the opposite factual finding: that many of these inmates

only have limited physical access to a law library, and do not receive help from legal assistants and law clerks. See *Casey v. Lewis*, 834 F. Supp. 1553, 1558-1560 (D. Ariz. 1992).

Stripped of these efforts to rewrite the factual findings below, the Petitioners' argument boils down to the claim that the Constitution requires prisons to do nothing more than provide non-English-speaking prisoners with physical access to the bare essentials of a law library. A prison's affirmative duties to these inmates are extremely limited, they assert. According to Petitioners, so long as non-English-speaking prisoners have physical access to a law library, and so long as the prisons do nothing to prevent communications among inmates, access to the courts for these inmates is *per se* "meaningful" under the Constitution. To require prisons to do anything more would be to place non-English-speaking inmates in a superior position relative to their non-institutionalized counterparts.

We strongly urge the Court to decline the Petitioners' invitation to reverse the Ninth Circuit on this question, and thereby disrupt the settled precedent in the Circuits as to the guarantee of "meaningful access" for non-English-speaking inmates. To inmates who neither speak nor read English, physical access to a law library is a fruitless privilege. A law library cannot possibly enable an inmate to prepare minimally adequate writs and pleadings if the inmate lacks the ability to decipher English text. Where, as here, these inmates lack reasonable access to trained bilingual assistants, access to the courts cannot be said to be any more meaningful than if the prisons provided them with no library at all.

The position advanced by the Petitioners is inconsistent, furthermore, with cases in other contexts in which the Court has held that the inability to communicate in English is not an adequate basis for denying individuals access to rights and privileges arising under federal law. See *Lau v. Nichols*, 414 U.S. 563 (1974). The "meaningfulness" of an inmate's access to the courts should not depend on his ability to read books written in English. If the purpose behind "meaningful access" is to enable inmates to properly present claims for consideration, then it makes little sense to inhibit the access of a significant subset of inmates on the basis of a characteristic having nothing whatsoever to do with the merits of their potential claims.

It is true, as Petitioners and their *amici* observe, that the Ninth Circuit's holding in this case places Arizona's prisons under an "affirmative" obligation to furnish bilingual assistance to non-English-speaking inmates. Constitutional claims are not invalid, however, simply because they would impose obligations on government that can be described as "affirmative" or "positive." See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Indeed, to say that government has no affirmative duties in this particular area is to deny the essential holding of *Bounds*, in which the Court imposed the very kind of affirmative obligations that the Petitioners here insist do not exist in the Constitution. The question here is thus not whether the obligation recognized by the Ninth Circuit is "affirmative" or "negative," but whether that obligation, affirmative or not, is logically and reasonably suggested by the reasoning of *Bounds*.

The Petitioners argue, furthermore, that the decision below is incorrect because it would place prison inmates in a superior position vis-a-vis their non-institutionalized counterparts, who are forced to use their own resources to overcome the language barrier. Here again the Petitioners are incorrect. It cannot seriously be argued that inmates who cannot read or speak English are in an equal position to their counterparts in society simply because they have physical access to a law library. Inmates have no practical access to the individuals and organizations that free persons ordinarily rely on for help in overcoming the hindrance of language, such as friends, relatives, and legal service organizations. Indeed, the provision of bilingual assistance to these inmates can be viewed as an effort to *approximate*, but in no way *surpass*, the much wider array of resources available to non-English-speaking persons who live outside the prison walls. By suggesting otherwise, Petitioners vastly understate the isolation experienced by inmates in general, and non-English-speaking inmates in particular.

Finally, the Petitioners argue that the remedy employed by the District Court in this instance was improper because each aspect of the injunction was not supported by a specific corresponding constitutional violation. Nowhere is this argument more obviously incorrect than in its application to the trial court's treatment of non-English-speaking inmates. In that context, the trial court made a direct, specific finding that Arizona's prisons denied non-English-speaking inmates meaningful access to the courts. On the basis of its finding of this specific constitutional violation, the Court directed Arizona's prisons to take affirmative steps toward increasing

the numbers of trained bilingual inmates available to assist those who cannot speak English. *See Casey*, 43 F.3d 1261, 1267 (9th Cir. 1994). Thus, this aspect of the District Court's order is plainly addressed to a specific constitutional violation, in precisely the manner that Petitioners claim is lacking.

For all of these reasons, the above-referenced *amici* respectfully request that the Court affirm the judgment below.

ARGUMENT

I. THE COURT SHOULD DISREGARD THE PETITIONERS' EFFORTS TO REWRITE THE DISTRICT COURT'S FACTUAL FINDING THAT MANY NON-ENGLISH-SPEAKING INMATES ONLY HAVE LIMITED PHYSICAL ACCESS TO LAW LIBRARIES.

In support of their position, Petitioners attempt to paint a cheerful picture of life as a non-English-speaking inmate in the Arizona prison system. Petitioners would lead us to believe that these inmates enjoy the same degree of access to the courts as those who live beyond the prison walls. Not only do non-English-speaking inmates have access to law libraries that are "excellent," but they also receive "help from legal assistants and law clerks." (Pet. Brf. at 35.) The Ninth Circuit's decision should be reversed, the Petitioners argue, because it would grant "convicted criminals . . . far greater legal resources in pursuing civil actions than law-abiding citizens." *Id.*

By mischaracterizing the District Court's factual findings in this way, the Petitioners have attempted to avoid the far more difficult task of directly defending a prison system that *only* provides many of its non-English-speaking inmates with access to law books they cannot read. Rather than directly defend a system of that kind, the Petitioners simply assume a different set of facts. If, after all, one assumes that Arizona's prisons do in fact provide these inmates *both* with physical access to a law library *and* assistance from trained (and, presumably, bilingual) legal assistants, then how could Arizona's prison system possibly fail to meet the requirements of *Bounds*?

The answer is that Petitioners' factual assertions are directly contrary to the findings of fact reached by the District Court, and which served as the factual predicate to its conclusion that Arizona's treatment of non-English-speaking inmates fell short of *Bounds*. For example, although it is true that Arizona provides libraries to the general inmate population, the District Court concluded that these libraries are anything but "excellent." Many of the libraries, the Court found, are marred by "missing or damaged legal materials" caused by "inadequate staffing." *Casey*, 834 F. Supp. at 1556. And for many inmates, whether English-speaking or not, physical access is restricted in ways that seriously undermine their ability to make use of the library. In several of the prisons, inmates are prohibited from browsing the shelves; in order to retrieve a book, they must submit requests to prison guards or "untrained prisoner law clerks" to retrieve specifically designated books. *Casey*, 834 F. Supp. at 1555-1556. These prisoner law clerks, selected from among the general inmate population, may only assist

inmates by performing the physical task of "giving them the requested material" from the library, and are not available to provide substantive assistance of any kind, since they lack any training to do so. *Id.* at 1559.

Each of the prisons operate a voluntary "legal assistance" program, through which limited numbers of trained inmates are made available to help fellow inmates "draft pleadings and do other legal work." *Casey*, 834 F. Supp. at 1559. The problem, however, is that "[t]here are an insufficient number of legal assistants available to assist prisoners who need legal assistance." *Id.* Despite the availability of these legal assistants to *some* inmates, many Arizona prisoners – whether English-speaking or not – have *no* practical ability to obtain assistance under this program, and therefore are provided nothing more than limited physical access to the libraries. Thus, "[t]he vast majority of adult prisoners incarcerated by ADOC have no adequate means to research the law, crystallize their issues, present their papers in a meaningful fashion, and get them filed in court." *Id.* at 1558.

For inmates who cannot read or speak English, these inadequacies are seriously exacerbated by the paucity of legal assistants capable of speaking their language. Even though 14.5% of the inmates in Arizona's prisons do not speak English, Arizona does nothing to "ensure that law libraries or facilities have Spanish-speaking legal assistants or law clerks." *Id.* at 1560. As a result, Arizona's prisons either have no bilingual assistants at all, or too few to meet the demand. *Id.* As the District Court found, "[i]n many facilities there are no Spanish-speaking legal assistants and law clerks." *Id.* The only alternative for these inmates is to attempt to seek assistance from fellow

inmates who speak Spanish, but who are neither law clerks nor legal assistants. In many instances, however, "these prisoners are unable to comprehend and translate legal terminology," making reliance on them useless at best, or prejudicial at worst. *Id.* at 1560. Indeed, the lack of sufficient bilingual assistance has directly resulted in the dismissal of cases, or in the inability of non-English-speaking inmates to file legal actions. *Id.* at 1558. In sum, the conditions in the Arizona prison system have worked to effectively block non-English-speaking inmates' access to the courts.

In light of these factual findings, it is simply incorrect for Petitioners to assert that non-English-speaking inmates in Arizona's prisons have access to "excellent libraries *plus* help from legal assistants and law clerks." This assertion directly contradicts the express factual findings of the District Court: that these libraries are poor, not "excellent"; that there are insufficient numbers of legal assistants and law clerks to meet the demands of the general inmate population; that the few inmate legal assistants and law clerks who *are* available to the general inmate population are of *no* help to non-English-speaking inmates; and that these conditions have directly resulted in the loss of claims that may have otherwise been valid on the merits.

Needless to say, the findings of the District Court may not be questioned unless they can be shown to be clearly erroneous.¹ See *Guzman v. Pichirilo*, 369 U.S. 698,

¹ Indeed, there is considerable authority for the proposition that the District Court's finding on the ultimate question of

701 (1962); *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960). Petitioners do not even attempt to make that claim, but endeavor nonetheless to cast a gloss over the record that directly contradicts the Court's express factual findings. The Court should disregard Petitioners' efforts to mischaracterize the record in this way. That record makes quite clear that Arizona's prisons have attempted to satisfy *Bounds* simply by making the bare essentials of a law library available to many of its inmates, even though a significant percentage of those inmates are wholly incapable of making use of that resource because they can neither speak nor read English.

"meaningfulness" is a question of fact, subject to the "clearly erroneous" standard of review. *See, e.g., Knop v. Johnson*, 977 F.2d 996, 999 (6th Cir. 1992) (applying the "clearly erroneous" standard of review to District Court's determination of "meaningfulness"); *Williams v. Lane*, 851 F.2d 867, 877 (7th Cir. 1988) (applying "clearly erroneous" standard to District Court's application of *Bounds*). Whether an inmate enjoys access to the courts that is "meaningful" is, as one court has commented, a "largely factual question" that requires inquiry of a factual nature into the extent and quality of an inmate's ability to prepare and file writs and pleadings. *Cepulonis v. Fair*, 732 F.2d 1, 4 (1st Cir. 1984). It is therefore appropriate to defer to the District Court's determinations on the ultimate question of meaningfulness under *Bounds*.

II. THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT IN ORDER TO GUARANTEE "MEANINGFUL ACCESS TO THE COURTS" FOR NON-ENGLISH-SPEAKING INMATES, PRISONS MUST ENSURE ACCESS TO A LAW LIBRARY AS WELL AS BILINGUAL INDIVIDUALS CAPABLE OF ASSISTING THESE INMATES TO MAKE USE OF THAT RESOURCE.

Petitioners in this case ask the Court, in essence, to overturn a series of Circuit Court opinions holding that a prison's duties to non-English-speaking inmates under *Bounds* is not satisfied when it furnishes library books to them that they cannot read. In that specific context, these cases hold, prisons must furnish inmates with persons who are capable of either assisting them make sense of these library materials, or of enabling them directly to prepare minimally adequate writs and other pleadings. The Court is here asked to disturb this reasoned application of the principles set forth in *Bounds*, but the Petitioners have failed to identify any good reason for doing so. This Court should therefore reject the Petitioners' efforts to transform *Bounds* into a useless constitutional rule for those inmates whose ability to help themselves is profoundly undermined by their isolation from the outside world and their inability to either speak or read the English language.

A. The Circuit Courts Have Uniformly Held that Prisons Cannot Satisfy *Bounds* Simply by Providing Non-English-Speaking Inmates with Physical Access to a Law Library.

The position that the Petitioners urge upon this Court is directly contrary to the caselaw in every Circuit that has directly commented on the proper application of *Bounds* to inmates who do not speak English. If the ultimate measure of constitutional adequacy is whether access to the courts is "meaningful," then it cannot be said that the establishment of a library is sufficient in itself to satisfy *Bounds* for all inmates. "That books would be of no use to the illiterate needs no discussion." *Hooks v. Wainwright*, 775 F.2d 1433, 1436 (11th Cir. 1985).

Every other Circuit that has commented on this question has reached the same result. See *Knop v. Johnson*, 977 F.2d 996, 1005 (6th Cir. 1992) ("[s]tanding alone, law libraries that are adequate for prisoners who know how to use them . . . are not adequate for prisoners who cannot read and write English"); *Valentine v. Beyer*, 850 F.2d 951, 957 (3d Cir. 1988) (noting that constitutional adequacy of library resources turned on whether illiterate and non-English-speaking inmates had access to paralegal assistance); *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 855-56 (9th Cir. 1985) ("[a] book and a library are of no use, in and of themselves, to a prisoner who cannot read"); *Cruz v. Hawk*, 627 F.2d 710, 721 (5th Cir. 1980) ("[l]ibrary books . . . cannot provide access to the courts for those persons who do not speak English or who are illiterate"); *Battle v. Anderson*, 614 F.2d 251, 255 (10th Cir. 1980) (remanding for factual determination whether illiterate prisoners in fact had access to inmate

law clerks in addition to physical access to library); accord *Wade v. Kane*, 448 F. Supp. 678, 684 (E.D. Pa. 1978) ("it is obvious that a prison library . . . is insufficient to provide [meaningful] access for inmates who are illiterate").

In this way, the Circuits have had little difficulty coming to a consensus as to the basic standards trial courts are to apply in this circumstance. Providing a library to non-English-speaking inmates is insufficient in itself to meet the "touchstone" of meaningful access. See *id.* With that limit in mind, prisons may satisfy their obligation under *Bounds* in a variety of ways. One method is simply to opt for the second alternative enunciated in *Bounds* – namely, arranging for these inmates to have "adequate assistance from persons trained in the law." *Bounds*, 430 U.S. at 829; see also *Lindquist*, 776 F.2d at 855. Alternatively, prisons may provide some combination of access to a library *together* with access to persons capable of rendering those materials accessible to non-English-speaking inmates. See *Knop*, 977 F.2d at 1006. This objective can be accomplished with programs for training bilingual inmates to serve as paralegals or law clerks. See *id.* It can be achieved by the happenstance of voluntary organizations making suitable quasi-legal services available to these inmates. See *Valentine*, 850 F.2d at 956-957. And it can be achieved in any other way that prison officials can devise of assuring access to the courts that is "meaningful" under *Bounds*.

These objectives are tempered, of course, by considerations of practicality. Trial courts should certainly adhere to the Court's admonition to apply *Bounds* in the first instance with due deference to the choices of prison officials. See *Bounds*, 430 U.S. at 833-834. This purpose can

and often is accomplished by relying heavily on the proposals of prison officials in fashioning appropriate remedies. These remedies, furthermore, must take into account the practical demands of operating a prison system. See *Campbell v. Miller*, 787 F.2d 217, 229 (7th Cir. 1986). Thus, an inmate's right of access to the courts is not limitless. See *Cepulonis v. Fair*, 732 F.2d 1, 4 (1st Cir. 1984). And the effectuation of that right must occur with due regard for the prison's legitimate penological objectives, such as maintaining the peace and protecting the safety and welfare of prison officials as well as inmates. See *Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978).

In short, the Circuits have reached a coherent consensus as to the applicability of *Bounds* to non-English-speaking inmates. *Bounds* unquestionably requires prisons to afford non-English-speaking inmates with either access to persons trained in the law, or access to individuals capable of rendering the law library a useful resource for them. Of course, this requirement – as with all others under *Bounds* – must be carried out with a proper sensitivity to the limits of judicial power and the practical demands associated with operating a prison system.

B. The Court Should Affirm this Caselaw Because it Represents a Reasonable and Logical Application of the Principles Enunciated in *Bounds*.

Contrary to the position advanced by the Petitioners, there is no need for this Court to disrupt the settled caselaw discussed above. To pretend that it is constitutionally adequate to provide inmates with physical access

to books they cannot read is no different from claiming that it is adequate to establish a library for *literate* inmates but deny them physical access to the stacks. The Circuits have all quite sensibly held that it is not enough for prisons to possess books but deny the general inmate population physical access to them, or so restrict that access as to transform the library into the equivalent of a vestigial organ. See, e.g., *Williams*, 584 F.2d at 1339 (commenting that it is insufficient to "simply provid[e] a prisoner with books in his cell" rather than permit the prisoner access to the library itself); *Kendrick v. Bland*, 586 F. Supp. 1536, 1551 (W.D. Ky. 1984).

This precedent is wholly consistent with caselaw recognizing that the inability to communicate in English is an unacceptable reason for denying a person access to basic rights and privileges under federal law. For example, in the context of public education, the Court has held that the right to participate in federally-funded educational programs cannot be satisfied for non-English-speaking students "merely by providing students with the same facilities, textbooks, teachers, and curriculum." *Lau v. Nichols*, 414 U.S. 563, 566 (1974). Without providing an adequate means for these students to understand what is being taught, "those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful." *Id.*

So too, in determining the adequacy of a non-English-speaking defendant's right to participate in the trial against him, the courts have properly held that the government must provide the assistance of a translator. It is a "nearly self-evident proposition," one court has

observed, that a defendant who cannot speak or understand English enjoys "a right to have his trial proceedings translated" for him so as to enable him to "participate effectively in his own defense." *United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970). There is no question, therefore, that government is obligated to furnish a translator to a defendant who cannot otherwise understand the proceedings due to impediments of language. See *United States v. Lam Kwong-Wah*, 924 F.2d 298, 309 (D.C. Cir. 1991); *United States v. Gallegos-Torres*, 841 F.2d 240, 242 (8th Cir. 1988).

The courts have similarly held that the adequacy of a non-English-speaking citizen's right to vote is measured by the meaningfulness of the act itself, taking into account the citizen's inability to understand English. "[T]he right to vote," the courts have held, "encompasses the right to an effective vote." *Puerto Rican Org. for Political Action v. Kusper*, 490 F.2d 575, 580 (7th Cir. 1973) (emphasis added). Thus, the courts have held that government is required to furnish translated ballots to voters who are unable to comprehend English. See *id.* at 580; *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974).

In each of these contexts, the courts have rejected the argument that strict equality of treatment dispenses with government's obligation to guarantee a person's rights and privileges. Rather, the courts have understood that government is required to do more; that it is required to take steps to ensure that a non-English-speaking person has the opportunity to exercise these rights in a manner that is *meaningful* in light of his or her inability to communicate in the predominant language of the nation. This concern is doubly fortified by the fact that language

ability is a characteristic that is closely connected with ethnicity, which, of course, may never serve as a basis for treating persons unequally. See, e.g., *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1925).

With the proper focus on the end product of "meaningfulness," then, *Bounds* similarly requires prisons to do more than merely furnish non-English-speaking inmates with a library that is sufficient for inmates who comprehend English. The right of access by an inmate who cannot read English is made no more meaningful by the provision of a law library than by the provision of pencils without paper, or envelopes without stamps. The physical availability of a law library simply makes little difference to an inmate who cannot read or speak English. To claim that the right of access for these inmates is rendered "meaningful" by the provision of a library is thus to claim that courts should take no account of the impediments of language. But as we have seen, the courts have long held that the government is obligated in many similar contexts to accommodate the impediments of language in ensuring the meaningful exercise of federal rights.²

² The failure to provide bilingual assistance to non-English-speaking inmates may also violate Title VI, 42 U.S.C. § 2000d and its regulations. The Department of Justice's Title VI regulations require that the methods of administration of a program, in this case the court access program, not "have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color or national origin." 28 CFR § 42.104(b)(2). Justice Department regulations specifically require that bilingual services be provided: "Where a significant number or proportion of the population eligible to be served . . . by a federally assisted

Nor is it possible for Petitioners to seriously maintain that providing a library to inmates who *can* make sense of those materials somehow absolves prisons of the constitutional obligation to ensure meaningful access for inmates who cannot. The Court was clear in *Bounds* that the right of meaningful access to the courts is not a right that is satisfied when a majority, or some other subset of the inmate population enjoys it. It is, rather, a right that is enjoyed by each inmate, apart from whether other inmates happen to have it. As the Court made clear in *Bounds*, states are affirmatively obligated "to assure all prisoners meaningful access to the courts." *Bounds*, 430 U.S. at 824 (emphasis added).

To say, then, that providing a library to the literate inmate population is sufficient under *Bounds* is to claim that non-English-speaking inmates enjoy "meaningful access" because they can rely on other untrained inmates to help them reduce their claims to competent legal writings. But there is no evidence in this case that non-English-speaking inmates receive competent bilingual assistance from their fellow inmates in this way. To the contrary, the District Court found that non-English-speaking inmates did *not* receive adequate assistance from fellow inmates. See *Casey*, 834 F. Supp. at 1560. The fact that non-English-speaking inmates may be permitted to *seek* competent bilingual assistance from other inmates

program . . . needs service or information in a language other than English in order to effectively . . . participate in the program, the recipient shall take reasonable steps . . . to provide information in appropriate languages to such persons." 28 CFR § 42.405(d)(1).

does not mean that they in fact *receive* that assistance. This is not to deny the theoretical possibility that, in some prisons, inmates may in fact benefit from the fortuity of sufficient numbers of fellow inmates who are willing *and* capable of providing competent assistance. However, such matters are simply not amenable to generalizations; whether non-English-speaking inmates receive assistance of the kind that renders their access meaningful is a question of fact, to be determined on a case-by-case basis at the District Court level.

If, in short, *Bounds* guarantees every inmate meaningful access to the courts, then the Court should conclude that it is insufficient to furnish non-English-speaking inmates with books they have no use for, "legal assistants" they cannot communicate with, and fellow inmates they cannot place their confidence in. Rather, as the Circuit Courts have uniformly held, prisons must ensure that these inmates have access to bilingual individuals who can perform the limited function of assisting them "to reduce their stories to intelligible written pleadings." *Knop v. Johnson*, 977 F.2d 996, 1006 (6th Cir. 1992).

C. Petitioners' Amici are Incorrect to Suggest that *Bounds* Places no Affirmative Obligations on Prisons to Ensure Meaningful Access.

As certain of Petitioners' amici point out, it is true, to be sure, that the provision of bilingual assistance to these inmates amounts to an obligation that is "affirmative." (See Washington Legal Found. Br. of Amici Curiae at 3-8.) However, the fact that this obligation can be described as

affirmative is not in itself an argument against recognizing the obligation as a constitutional one. This Court has long recognized, in areas too numerous to catalogue here, that many of the Constitution's provisions place affirmative obligations on government. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963) (states have affirmative obligation to furnish indigent defendants with state-subsidized counsel); *Gallegos-Torres*, 841 F.2d at 242 (states have affirmative obligation to furnish interpreter to non-English speaking defendant); *Miranda*, 384 U.S. 436 (1966) (police officers have affirmative obligations to advise arrestee of rights).

The imposition of affirmative obligations arises with frequency in the context of a District Court's efforts to fashion effective remedial measures designed to cure unconstitutional conduct. *See United States v. Fordice*, 505 U.S. ___, 112 S. Ct. 2727 (1992) (state is under obligation to take affirmative steps to reverse the effect of a segregated public university system). These cases include those involving efforts to bring prison systems into line with basic constitutional standards. *See Bell v. Wolfish*, 441 U.S. 520 (1979); *Brogsdale v. Barry*, 926 F.2d 1184 (D.C. Cir. 1991); *Ryan v. Burlington County*, 674 F. Supp. 464 (D.N.J. 1987).

Indeed, for Petitioner's *amici* to argue that prisons owe no affirmative obligations to inmates is to argue that *Bounds* itself was wrongly decided, for the Court in that case expressly rejected that argument. In *Bounds*, the Court was directly confronted with the invitation to adopt the very distinction urged upon the Court today by Petitioner's *amici*. There, the prison officials argued that "as long as inmate communications on legal problems are

not restricted, there is no further legal obligation to expend state funds to implement affirmatively the right of access." *Bounds*, 430 U.S. at 824. The Court rejected that argument, *see id.* ("[t]his argument misreads the cases"), noting that the relevant caselaw already imposed affirmative obligations on prisons for the specific purpose of guaranteeing an inmate's access to the courts. *See id.* at 825 ("our decisions have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access").

In rejecting this argument, the Court made clear that the inquiry is not whether the obligation is positive or negative, but "whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental rights." *Bounds*, 430 U.S. at 826. Thus, it begs the central question in this case for Petitioners' *amici* to characterize the obligation claimed here as "affirmative." The question that they have failed to answer persuasively – and the question that is dispositive under *Bounds* – is whether that obligation is logically compelled by the "touchstone" of meaningful access.

D. The Result Below Will Not Place Non-English-Speaking Inmates in a Superior Position Vis-a-Vis Non-Institutionalized Counterparts.

At the heart of Petitioners' criticism of the Ninth Circuit is the claim that the result below will somehow place the affected inmates in a *superior* position in comparison to their counterparts in free society. (*See* Pet. Brf. at 35.) Whatever the boundaries of an inmate's right of

access, Petitioners claim, the Constitution cannot be read in such a way as to place individuals convicted of crimes and serving their sentences in any better position than if they had never been convicted of a crime. Because the Ninth Circuit's holding would impose upon prisons the obligation to provide illiterate and non-English-speaking inmates with assistance that free persons do not have access to, that decision must be incorrect.

This argument is flawed, in part because of the fatal weakness of its premise. It is simply not true that the Constitution *never* grants inmates or criminal defendants rights that are otherwise unavailable to individuals whose conduct has kept them clear of troubles with the law. A civil litigant has no right to state-subsidized counsel, see *Mallard v. United States Dist. Court for S. Dist. of Iowa*, 490 U.S. 296 (1989), but a criminal defendant unquestionably does. See *Gideon*, 372 U.S. at 335. Government is under no obligation to furnish free persons with food, clothing, or shelter, but it must provide these bare essentials to individuals confined in prison. See *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977); *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1977). Prisoners are entitled as a matter of constitutional right to physical protection from other prisoners; no such constitutional right has ever been recognized as to persons residing in free society. See *Farmer v. Brennan*, 511 U.S. ___, 114 S. Ct. 1970 (1994).

Indeed, in *Bounds* itself, the Court extended to prisoners a constitutional right not otherwise available to free persons. Although all persons enjoy the right to open and unhindered access to the courts, the Court has never held or implied that this right imposes an affirmative obligation on government to furnish state-subsidized law

libraries to them, or if one is not available, to furnish persons adequately trained in the law. And yet the Court was willing to grant this right to inmates, in light of the obvious and unique difficulties associated with participating in the judicial process from the vantage point of a prison cell.

In any event, the deeper problem with Petitioners' position is that it grossly misunderstands the unique impediments confronted by non-English-speaking inmates in presenting claims to the courts. It is simply not true that these inmates will be placed in a better or even roughly equal position vis-a-vis their non-institutionalized counterparts by furnishing them access to trained bilingual inmates. It is difficult to overstate the degree of isolation experienced by prisoners in general, not to mention those who cannot understand or read English. An inmate confined to prison is cut off from the outside world, and from the individuals most inclined to provide assistance to him. While contact with visitors is permitted, it is severely restricted. Inmates are often held in institutions located far from home, making regular visits from family and friends impractical at best, and impossible at worst.

Unlike his non-institutionalized counterpart, the non-English-speaking inmate cannot turn to bilingual relatives and friends for help in negotiating the shelves of a law library. He is unable to earn an income sufficient to enable him to retain the services of a bilingual lawyer, or of a translator. And he cannot seek assistance from non-profit legal organizations that have bilingual attorneys, paralegals, or other staff members who are capable of assisting him to make sense of the legal system. In this

way, providing trained bilingual assistance to these inmates would amount to an effort to *approximate* conditions beyond the prison walls, not to surpass them, as Petitioners suggest.

E. The Remedy Afforded by the District Court as to Non-English-Speaking Inmates Was Designed to Address a Specific Constitutional Violation.

Finally, the Petitioners mount a broad-based attack against the methods utilized by the trial court in this case for effectuating the constitutional principles set forth in *Bounds*. However, Petitioners' attack upon the District Court's remedial measures is most obviously flawed in connection with the Court's treatment of non-English-speaking inmates. The Petitioners' central criticism of the District Court's injunction is that it fails to tie each of the specific remedial measures to a corresponding, specific constitutional violation. "[T]he particular components of the injunction," Petitioners complain, "are overbroad and not adequately supported by any finding of a constitutional violation." (Pet. Brf. at 39.)

In the context of non-English-speaking inmates, however, Petitioners utterly fail to demonstrate the absence of a nexus between the violation and the remedy. Petitioners claim that there is no such nexus *not* by demonstrating a lack of fit between the constitutional harm (the denial of meaningful access to the courts) and the remedy (ordering the prisons to increase bilingual assistance to non-English-speaking inmates). Rather, Petitioners make this argument by *repeating* their claim that there has been no

underlying constitutional violation. (Pet. Brf. at 45 (arguing that the District Court's remedy was inappropriate because Arizona's program "fulfills constitutional requirements")).

The Petitioners abandon any efforts to criticize the fit between the violation and the remedy in this context because, under the very cases they rely on, the requirement of "narrow tailoring" is amply satisfied. Petitioners are correct to observe that in evaluating the appropriateness of a judicial remedy, the Court must determine whether that remedy "serv[es] as a proper means to the end of restoring the victims of [unconstitutional] conduct to the position they would have occupied in the absence of that conduct." *Missouri v. Jenkins*, 515 U.S. ___, 115 S. Ct. 2038, 2049 (1995). Put differently, "[t]he remedy must therefore be related to 'the condition alleged to offend the Constitution.'" *Milliken v. Bradley*, 433 U.S. 267, 280-281 (1977) (*Milliken II*) (citations omitted).

Petitioners fail to demonstrate in what sense the District Court's remedy as to non-English-speaking inmates is unrelated to the Court's express finding that they have been denied constitutionally adequate access to the courts. The District Court found that Arizona's failure to supply bilingual assistance to non-English-speaking inmates resulted in the lack of meaningful access to the courts. Thus, there can be no question that the corresponding remedy was appropriate. To remedy this wrong, the Court merely directed Arizona to furnish sufficient numbers of bilingual law clerks to meet demand, and to take "[p]articular steps . . . to locate and train bilingual prisoners to be Legal Assistants." *Casey*, 43 F. Supp. at 1274, 1277. At a minimum, the Court ordered,

"schedules and notices relating to all institutional legal services and programs [must] be made available in Spanish and English." *Id.*

These remedies are designed to directly remedy the specific constitutional harms found to exist as a result of the failure of Arizona's prisons to furnish bilingual assistance to non-English-speaking inmates. For these reasons, the remedy issued by the District Court was appropriately tailored to the specific constitutional harm found to exist as to non-English-speaking inmates.

CONCLUSION

For all of the reasons set forth above, we respectfully urge this Court to affirm the judgment below.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

No. 94-1511

SAMUEL LEWIS, *et al.*,

Petitioners,

v.

FLETCHER CASEY, JR., *et al.*,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE*,
LEGAL AID BUREAU, INC.,
IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE**

The Legal Aid Bureau, Inc., (hereinafter the "Bureau") is filing this *amicus curiae* brief in support of the position of the Respondents because it believes that Maryland's experience in providing prisoner access to the courts through a staffed legal services program should be considered by the Court when addressing the questions presented in this case.

* Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3

The Bureau, a non-profit legal services program with offices throughout Maryland, has been in existence for over 80 years. The Bureau established its prisoner legal services unit in the early 1970's in response to an unmet need of state prisoners for civil legal services. Shortly after the Court's ruling in *Bounds v. Smith*, 430 U.S. 817 (1978), Judge Frank A. Kaufman of the United States District Court for the District of Maryland ruled, with the concurrence of the Maryland Attorney General and other officials, that for Maryland prisoners meaningful access to courts would best be obtained with the assistance of persons trained in the law. *Carter v. Kamka*, 515 F. Supp. 815 (D. Md. 1980). The Bureau remains as counsel for the plaintiff class in *Carter*. As the number of prisoners has increased from just a few thousand to the present population of approximately 21,300, the work of the Bureau's Prisoner Assistance Project ("PAP") has grown and diversified in keeping with changes in the prison population and prison law.

Through the years PAP has been instrumental in bringing about changes in Maryland's prisons which have made them safer and more humane, in clarifying the rights of prisoners and prison officials, in helping ignorant, illiterate and mentally disabled prisoners bring their legal problems to the attention of the courts, in negotiating with prison officials for relief of prisoner problems, and in helping prisoners understand and accept the laws and regulations under which they must function.

PAP's services have proved to be important not only to the prisoner clients but also to the state and the communities to which they ultimately return with a better sense of the just

and proper use of the law. The Bureau files this *amicus* brief in the hope that such services will be expanded to meet the changing and growing needs of the prisoner population.

INTRODUCTION

Maryland has in its custody approximately 21,300 prisoners in 24 facilities, several half-way houses, the Baltimore City Detention Center and home detention program, and temporarily in several local jails.¹ Daily Population Report for September 25, 1995. This number of prisoners closely approximates that of Arizona, which is currently 22,000. Pet. Brief at 3.

Approximately 20% of Maryland's inmates read below a third grade level, a figure which includes mentally disabled inmates and a majority of the deaf inmates. The average literacy rate for inmates received into the Maryland correctional system during the period January to July 1995 was below the nationally recognized standard for literacy of the eighth grade.² Of the total prison population, at least 85% have not graduated from high school. Educational

¹ The Maryland Department of Public Safety and Correction (hereinafter "the Department") operates the Maryland Division of Correction ("MDOC") and Patuxent Institution for state prisoners who have been committed to the custody of the Commissioner of Correction, primarily those sentenced to terms of twelve months or more. Patuxent Institution operates directly under the Department to provide a therapeutic program pursuant to Md. Ann. Code, Art. 31B (1957, 1993 Repl. Vol. and 1995 Supp.), and a mental health facility for prisoners.

² This figure is derived from the Test of Adult Basic Education (TABE), a national standardized test administered to all incoming Maryland inmates.

Coordinating Council for Correctional Institutions 1995 Report. The inability of this educationally disadvantaged population to fend for itself in state and federal courts is axiomatic and is made crueler by the fact that the prisoner litigator is almost always opposed by the Maryland Attorney General's Office, with approximately 15 attorneys permanently assigned to MDOC matters and additional litigation specialists available for special assignment. Likewise, private law firms represent MDOC medical contractors when prisoners litigate medical claims.

MDOC inmates gain access to the courts through a combination of services. Maryland's Public Defender provides representation in criminal trials, appeals, parole revocation hearings, and at hearings on certain post-conviction petitions. Library Assistance to State Institutions ("LASI") mails to prisoners copies of cases which they request.³ PAP is the primary source of civil legal assistance to Maryland prisoners.⁴ PAP provides legal research, gives legal opinions and advice, investigates claims, prepares pleadings and other legal documents, negotiates with MDOC and medical personnel for settlement of prisoners' legal problems and in some cases represents prisoners, primarily in their civil rights and constitutional claims. PAP also prepares manuals on a variety of legal topics to assist prisoners in understanding the law and using the legal process applicable

³ In order to obtain a copy of a particular decision, the prisoner must be able to provide a correct citation.

⁴ PAP has a staff of seven attorneys, a law graduate, and seven legal assistants.

to their problems. No MDOC institutions have more than a rudimentary law library. Nine MDOC facilities have general libraries with limited legal materials. Correctional Education Libraries Required Reference List. It is through the combination of these services that Maryland meets its constitutional obligations under *Bounds v. Smith*, 430 U.S. 817 (1977); *Hall v. Maryland*, 433 F. Supp. 756 (D.Md. 1977), *modified and aff'd sub nom. Carter v. Mandel*, 573 F.2d 172 (4th Cir. 1978), *on remand Carter v. Kamka*, 515 F. Supp. 825 (D.Md.1980), to assure that prisoners have meaningful access to the courts.

Prisoners as individuals have the same range of legal problems as persons who are not incarcerated, as well as problems unique to incarceration. In 1994 PAP received nearly 3,000 requests for assistance. Of these, 259 requests concerned problems not related to incarceration; the remainder were endemic to or arose out of imprisonment. The non-incarceration issues ranged from adoption to worker's compensation, from divorce to bankruptcy.⁵ Responding to these requests, PAP provided meaningful and effective access to courts, as well as the bases for informed decisions not to file court proceedings. Such services are not provided by law libraries or persons untrained in the law.

⁵ PAP also acts as a gatekeeper. Of the 2,422 files which it closed in 1994, 99 were closed because investigation and research had shown that the case was without merit.

Even assuming that Maryland could afford to maintain a law library in every prison,⁶ not all prisoners would have access. Currently, prisoners on segregation are not permitted to use existing libraries for security reasons. Although they may obtain some books from the library by submitting a request to the librarian, legal materials are normally designated as "reference" books and may not be checked out. Prisoners at Maryland's highest security prison, the Maryland Correctional Adjustment Center ("Supermax"), are not allowed to have any contact with other prisoners. This means that a schedule would need to be worked out so that each of the 220 Supermax prisoners would be allowed sufficient time in the library to do research and prepare pleadings. Supermax prisoners are able to contact PAP for legal assistance despite their isolation.

SUMMARY OF ARGUMENT

Without the availability of lawyers and trained legal assistants, the right of access to the courts recognized in *Bounds v. Smith*, 430 U.S. 817 (1978), remains unobtainable to the vast majority of prisoners as a result of their illiteracy or functional illiteracy, mental disability, deafness, and restrictions on their liberty. Nor does offering prisoners with these limitations a law library without trained legal assistance to navigate the shelves and the law provide them meaningful access to the courts. Maryland's experience in meeting the

⁶ In Maryland, this would be neither cost effective nor fair. Three MDOC facilities hold less than 200 prisoners. Another four hold between 200 and 500. The largest facility holds over 2800. Prisoners in the smaller facilities would be able to spend much more time in the library on the average than those in the larger facilities.

decree of *Bounds* relies on a combination of services, the principle component of which is the PAP with its staff of lawyers and legal assistants, as Maryland does not maintain law libraries in its prisons.

1. *Pro se* prisoner litigants in Maryland face an arduous task before being able to reach a court with their claims. Exhaustion of administrative remedies requires a multi-tiered, time-consuming process leading eventually to an administrative hearing. Other requirements may include filing claims with the State Treasurer and the Health Claims Arbitration Office. After sorting through these administrative remedies and each of their separate time requirements, prisoners must then determine where to file their legal action. These varied legal requirements create extensive hurdles for Maryland prisoners for which they must turn to knowledgeable legal practitioners for adequate advice prior to filing a civil action in federal or state court or determining not to file.

2. Computation of prisoners' sentences, credits for time served, good time credits and parole eligibility raise complex legal issues for which access to trained legal personnel is essential. Beside reliance on case law, prisoners must have access to manuals, handbooks and instructions, many of which are dense and lengthy and, often, not available to prisoners.

3. Petitioners' claim that a prisoner's access to courts to resolve legal claims is protected by liberal pleading standards and appointment of counsel by the courts does not withstand the scrutiny of actual Maryland experience. Maryland state courts do not appoint counsel as they lack authority to do so.

Maryland courts also hold *pro se* litigants to the same procedural and substantive standards as parties represented by attorneys.

4. Varied resources are available in Maryland for residents with legal problems including general and specialized legal services offices, court clerks providing forms and filing instructions, *pro se* courses, advice telephone hotlines and *pro bono* programs. However, those resources are usually not available to prisoners because of their incarceration and inability to contact those resources. This actual disparity of legal assistance in Maryland disproves Petitioners' unsubstantiated claim that the ordered relief in the district court would provide prisoners "access that far exceeds that available to ordinary residents. . . ." Without PAP, Maryland's prisoners would not have meaningful access to the courts and clearly would be at a disadvantage as compared to non-incarcerated "ordinary residents."

ARGUMENT

I. Navigating Exhaustion Requirements Is An Arduous Task That Illiterate and Ignorant Prisoners Would Be Unable To Accomplish Without Legal Assistance.

For Maryland prisoners the questions that must be answered before filing suit are: whether to file, what to file, where to file, when to file, how to file and what to do before filing. The answers to these questions are often extremely complicated and will vary from case to case. For maximum benefit of both prisoners and courts, these decisions must be based on the advice of legally trained persons familiar with federal and Maryland law and MDOC procedures.

Accordingly, even where access to courts is not directly impeded, prisoners who seek the aid of courts and administrative agencies face difficult and often insurmountable barriers before obtaining a review of the merits of their claims. Before filing a civil rights action under 42 U.S.C. §1983 in either federal or state court, MDOC prisoners must first determine whether their problems are subject to the prison administrative remedy procedure ("ARP"),⁷ and if so, they must exhaust the ARP.⁸ This procedure is contained in 28 separate MDOC Directives ("DCD") which total 66 pages and have 14 appendices. DCDs 185-001 through 185-700 (effective April 1, 1993). The ARP requires the following steps:

1. A prisoner first files a request for informal resolution of the complaint with the appropriate staff member. Prison officials have 15 days from the date they receive the request to respond.

2. After receiving the response to a request for informal resolution, the prisoner must file a request for administrative remedy with the warden. The institution has five working days from the date it receives the request to "index" it. The

⁷ The ARP requirements do not apply to prisoners at the Patuxent Institution or to incidents not involving Division of Correction employees. Not even all complaints against DOC employees are subject to the administrative remedy procedure. Complaints about classification decisions, disciplinary proceedings, and parole proceedings are excluded.

⁸ In *Robert Allen v. John Conte*, Civil No. L-85-1970 (D. Md.) (unpublished), the ARP was certified as being in substantial compliance with 42 U.S.C. §1997e and 28 C.F.R. §40.

warden then has thirty days from the date the request is indexed to respond and may request an additional ten days.

3. After receiving the warden's response the prisoner must file an appeal to the Commissioner of Correction. The Commissioner's office has five working days from the date it receives the appeal to index it. The Commissioner has twenty days from the date an appeal is indexed to respond.

A prisoner who wants to file a civil action against the MDOC or a MDOC employee grounded upon Maryland law must follow additional procedures before filing suit. The prisoner must first exhaust the ARP. Md. Regs. Code Tit. 12, §07.01.03D (1972, 1994) If the complaint involves a prison disciplinary proceeding, the appeal procedure must be exhausted, pursuant to MDOC Directives. Next, a complaint with the Inmate Grievance Office ("IGO") must be filed. *McCullough v. Wittner*, 314 Md. 602, 552 A. 2d 881 (1989).

The IGO has sixty days to perform an initial review to determine if the case should be dismissed without a hearing. Md. Ann. Code Art. 41, §4-102.1(d) (1957, 1993 Repl. Vol. and 1995 Supp.). If the complaint is not dismissed it is referred to the Maryland Office of Administrative Hearings. A prisoner is not allowed to use prehearing discovery, Md. Regs. Code Tit. 12, §07.01.08B, and can only call "such witnesses as the [Inmate Grievance] Office or an administrative law judge agrees may have relevant testimony to submit and as may be available at reasonable times." Md. Regs. Code Tit. 12, §07.01.08C(2). Although hearings are supposed to be held and decisions issued promptly, there are no actual limits on when a hearing will be held or a decision issued. If the administrative law judge finds the complaint to

be meritorious, the decision must then be reviewed by the Secretary of the Department within fifteen days of receipt. Md. Ann. Code., Art. 41, §4-102.1(e)(2)(1957, 1993 Repl. Vol. and 1995 Supp.).

If all of the applicable deadlines are met, it will take six months to a year for a prisoner to receive a final decision. The prisoner then has thirty days to file an appeal to the state circuit court of the jurisdiction in which he or she is incarcerated.

In addition to these procedures, which apply only to prisoners, anyone who has a claim against the State of Maryland, a state agency or a state employee must file notice with the Maryland State Treasurer before filing suit. Md State Gov't Code Ann., § 12-106(b) (1993 Repl. Vol. and 1995 Supp.).

When the prisoner's complaint involves inadequate medical care and the prisoner is seeking more than \$20,000.00 in damages, the prisoner must also follow the procedures contained in the Maryland Health Claims Arbitration Act, Md. Cts. & Jud. Proc. Code Ann., §3-2A-01 *et seq.* (1995 Repl. Vol.). Currently most health care in MDOC facilities is provided by private contractors so the prisoner is not required to exhaust the IGO and State Tort Claims Act procedures.⁹ There are, however, a small group of health care providers employed directly by the MDOC. To

⁹ Despite the fact that most health care providers are not MDOC employees, prisoners are still required to exhaust the ARP before filing a constitutional claim based upon deliberate indifference to a serious medical need.

further complicate the prisoner's litigation decisions, three different health care companies provide health services at different prisons. For a Maryland prisoner, figuring out whom to sue in a medical claim and what procedures must first be exhausted requires a high degree of legal expertise.

Once the proper defendants have been identified, the question of where to sue must be addressed. In Maryland, original jurisdiction in a civil action may exist in either the state circuit or state district court depending upon the relief being sought and whether a jury trial is requested. *See*, Md. Cts. & Jud. Proc. Code Ann., §§ 4-401, 4-402 (1995 Repl. Vol.). In addition to the general rules on venue, *see, id.*, §6-201 *et seq.*, there are some circumstances in which prisoners must file in the jurisdiction where they are incarcerated. *See*, Md. Ann. Code Art. 41, §4-102.1(k)(1957, 1993 Repl. Vol. and 1995 Supp.)(appeals of IGO decisions).

This labyrinth of procedural requirements and time limitations is, moreover, formidable for even practiced attorneys, much less the unassisted prisoner. In jurisdictions such as Maryland where the *pro se* litigator is held to the same standards as attorneys, it is patently unjust to deprive prisoners of the basic tools of litigation - books they can read and understand and the advice and assistance of lawyers and trained legal assistants.

For prisoners who suffer from mental disabilities, the administrative barriers to access to the courts in Maryland noted above are insurmountable without assistance from persons trained in the law. Such inmates are unable to proceed successfully in even the simplest of cases. Illustrative, is the case of a prisoner designated herein as Mr.

Smith.¹⁰ This inmate, because of his inability at times to conform his behavior, has found himself subject to disciplinary procedures and to the loss of good conduct credits. In fact, like many mentally troubled inmates, he has lost almost all of his good conduct credit and, despite his comparatively minor non-violent crime, will serve every day of his 18 month sentence in Supermax without parole or release on good conduct credits. Mr. Smith has been subjected to numerous disciplinary proceedings, known as adjustment hearings, held before MDOC hearing officers. Appeals from decisions of adjustment hearing officers must be filed with the IGO, not through the ARP. After each of his adverse adjustment decisions and loss of credit, Mr. Smith attempted to file an appeal, but due to ignorance of proper procedure, he filed, over and over again, appeals with the wrong body, the ARP coordinator. Each time Mr. Smith filed such an appeal, it was returned by the Warden with a written response informing him that his appeal is administratively dismissed because the ARP procedure is not the proper procedure for appealing an adjustment decision. Mr. Smith did not learn of the proper appeal procedure until he contacted PAP and was assisted in appealing those decisions which had not yet become time-barred.

¹⁰ PAP clients whose cases are not matters of public record are not identified by their true names in order to protect the attorney-client privilege.

II. Illiterate and Ignorant Prisoners Must Have Legal Assistance In Order To Properly Review Issues Related To Complex Sentencing Calculations.

The complicated and arcane Maryland laws regarding computation of prisoners' sentences and related issues of credit for time spent in custody, parole eligibility, and diminution of confinement credits ("good time"), require that illiterate and ignorant prisoners have access to specialized legal services if they are to challenge MDOC miscalculations through habeas corpus petitions in federal and state courts.¹¹ Statutes governing whether a sentence is consecutive or concurrent are scattered throughout the Maryland Code. *See, e.g.*, Md. Ann. Code, Art. 27, §139 (1957, 1992 Repl. Vol. 1995 Supp.) (sentences for escape to be consecutive to any sentence being served at time of escape); Md. Ann. Code, Art. 27, §690C (1957, 1995 Supp.) (sentence computation consecutive to sentence for which the defendant is on parole). In addition to the various statutes there are numerous internal memoranda prepared by MDOC staff explaining how to handle specific situations. These documents are not routinely available to prisoners. PAP staff successfully challenged the former MDOC practice of running a sentence that was to be "consecutive to sentence now serving" to all of a prisoner's term of confinement. *Robinson v. Lee*, 317 Md 371, 564 A.2d 395 (1989). This decision led to a policy change that affected hundreds of prisoners. In individual instances PAP has successfully challenged the retroactive application of a change in a policy for determining the starting date of

¹¹ Since habeas corpus is civil in nature, PAP attempts to provide assistance and representation where the complaint has merit.

consecutive sentences. *Gregory Smith v. Eugene Nuth*, Circuit Court for Anne Arundel County, Case No. C-92-06659 (July 16, 1992) (Lerner, J.)

Parole eligibility is also complex. Many Maryland statutes require the imposition of a non-parolable sentence. *See, e.g.* Md. Ann. Code Art. 27, §36B(d); *id.* §286; *id.* §643B (1957, 1992 Repl. Vol. and 1995 Supp.) Otherwise, a prisoner becomes eligible after serving either 1/4 or 1/2 of the sentence, depending upon the offense and the date it was committed. Md. Ann. Code Art. 41, §4-516 (1957, 1993 Repl. Vol. and 1995 Cum. Supp.). Parole eligibility for defendants admitted to the Patuxent Institution is subject to the exceptions in Md. Ann. Code, Art. 31B, §11 (1993 Repl. Vol. and 1995 Supp.). PAP successfully challenged retroactive application of an amendment requiring that the Governor approve the parole from the Patuxent Institution of any prisoner serving a life sentence. *Gluckstern v. Sutton*, 319 Md. 634, 574 A.2d 898, *cert. denied*, 498 U.S. 950 (1990).

Most complicated of all is the calculation of diminution of confinement credits earned by prisoners. The number of credits a prisoner may earn varies for each institution, the date sentence was imposed and the offense. Md. Ann. Code, Art. 27, §§ 700 & 704A (1957, 1992 Repl. Vol. and 1995 Supp.). MDOC instructions for calculating credits are contained in its Commitment Procedures Manual which is several hundred pages long. PAP has successfully challenged policies denying diminution credits to prisoners serving sentences for contempt, *Harry Garrison v. Thomas Corcoran*, Circuit Court for Anne Arundel County, Case No. C-94-14093 (August 29, 1994) (Lerner, J.), and denying

diminution credits earned while in a local jail, *Ernest Johnson v. Sewall Smith*, Circuit Court for Baltimore City, Case No. 16803623 (February 14, 1994) (Smith, J.). In all of these cases the questions presented were simply too complicated for a *pro se* prisoner to proceed without legal assistance.

The extraordinary *pro se* odyssey of William Barnes further illustrates this problem, complicated in this instance by the nature of the federal system. With pen and paper supplied by MDOC, Mr. Barnes wrote to the courts. Without an attorney, however, his access proved far from meaningful and he remained illegally incarcerated for almost ten years.

Mr. Barnes was confined in penal institutions or mental health facilities starting in 1957 when, at the age of 16, he was sentenced to two years for larceny of an automobile. After sentencing, he was ordered evaluated by the Patuxent Institution under Maryland's "defective delinquent" law, former Md. Code, Art. 31B,¹² and was committed to Patuxent as a defective delinquent in 1958. He was recommitted in 1961 and again in 1964.¹³ He was to remain under the jurisdiction of Patuxent until 1976. Along the way, while in prison, he received additional criminal sentences.

In 1976, in a habeas corpus proceeding, the United States District Court for the District of Maryland found Mr. Barnes'

¹² See, *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972), for a discussion of former Art. 31B.

¹³ See, *Barnes v. Director, Patuxent Institution*, 240 Md. 32, 212 A.2d 465 (1965); *Barnes v. Director, Patuxent Institution*, 227 Md. 641, 175 A.2d 20 (1961).

original two year sentence invalid under *Long v. Robinson*, 436 F.2d 1116 (4th Cir. 1971), (Baltimore City ordinance permitting 16 and 17 year old juveniles to be tried automatically as adults violated the Equal Protection Clause). Under the case of *Gee v. State*, 239 Md. 604, 212 A.2d 269 (1965), the vacation of the criminal conviction which formed the predicate for commitment as a defective delinquent entitled the prisoner to be released. Although *Long* allowed Maryland to retry Barnes, the authorities did not do so. Rather, they transferred him to the Maryland Penitentiary to begin service of the more recent sentences.

Certain of these sentences had been imposed concurrently and others were ordered served consecutively. MDOC allowed Barnes credit for time served from June 7, 1971, the date the first of the new criminal sentences was imposed, but refused to allow any credit for time served or "good time" earned before that date, even though incarceration after expiration of the original two year sentence in 1959 had been declared illegal.

Although having received some relief in federal court, Barnes believed, correctly, that he was entitled to credit for the time he served between 1959 and 1971. He continued to attempt, *pro se*, to gain this relief by filing further papers and appeals in the federal courts. His request for damages was rejected in *Barnes v. Maryland*, Civil No. M-75-1674, the companion to his federal habeas case. On appeal from both cases, the Fourth Circuit denied relief in unpublished *per curiam* opinions. In *Barnes v. Warden, Md. Penitentiary*, Civil No. M-78-1031, a habeas action, the federal district court ruled that federal law did not require that credit be

given a state prisoner under these circumstances. Barnes then attempted to obtain credit for time served since 1957 in a §1983 action in federal court. This claim was rejected on *res judicata* grounds in *Barnes v. Niles*, Civil No. M-84-559. In *Barnes v. Calhoun*, Civil No. H-84-3475, his claims were rejected as incomprehensible. In *Barnes v. Schaefer*, Civil No. S-87-2229, his claim was construed as one for damages only and again rejected on the basis of *res judicata*. *Barnes v. Maryland*, Civil No. S-87-3298, met a similar fate. The Fourth Circuit rejected each appeal and several original filings. Barnes fared no better in the Maryland courts. His numerous filings under the Maryland Post Conviction Procedure Act, Md. Ann. Code, Art. 27, §645A (1957, 1992 Repl. Vol. and 1995 Supp.), were rejected by both the Howard County and Baltimore City circuit courts. In a state habeas case filed in Baltimore City in 1978, his claims were rejected for want of ripeness.¹⁴ In 1991, several petitions later, the Baltimore City circuit court rejected his claim as incomprehensible and unintelligible. Administrative claims filed with the IGO foundered for one reason or another. Appeals and original filings in the Maryland Court of Special Appeals and the Maryland Court of Appeals were dismissed.

¹⁴ In contrast to federal habeas corpus, see, *Peyton v. Rowe*, 391 U.S. 54 (1968), early Maryland cases hold that a habeas petition challenging an allegedly excessive sentence may not be adjudicated until the legal portion of the sentence had been served. See, e.g., *Roberts v. Warden, Maryland Penitentiary*, 206 Md. 246, 111 A.2d 597 (1955). While the soundness of this "prematurity" doctrine has been called into question by recent decisions of the Maryland Court of Appeals, the *Roberts* rule was applied to Barnes' petition.

After the decision in *Robinson v. Lee, supra*, MDOC calculated Barnes' term of confinement as an aggregate of 27 years, commencing in 1971. In 1992, PAP staff interviewed Barnes and realized that there was reason to investigate. While it was difficult to obtain records from the various courts because of the age of the proceedings, once the facts were known with certainty, Maryland law was relatively clear on the question. Md. Ann. Code, Art. 27, §638C(c) provides that a person who is serving multiple sentences, one of which is set aside, must receive credit against the remaining term for time served under the vacated conviction. The trial judge is to determine the credit at sentencing (or resentencing). *Id.* at (d). When Barnes' 1957 conviction was set aside in 1976, he was serving multiple sentences, both as a defective delinquent and also under the new convictions. He was, in fact, serving "multiple sentences, one of which [was] set aside as a result of direct or collateral attack. . . ." *Id.*, at (c). Since Barnes had never been retried on the 1957 charges, he had never been brought back to court so that proper credit could be allowed.

PAP filed a habeas petition in the Baltimore City circuit court. On this occasion, when served with the petition and supporting documents, MDOC agreed with the majority of Barnes' contentions and released him without filing an answer. With the "good time" attributable to his incarceration prior to 1971, which had not been allowed by the MDOC it is estimated that Barnes was illegally detained for almost a decade. Had it not been for the legal assistance he received, he would most likely still be incarcerated despite the numerous *pro se* complaints he filed in the courts. Since his

release, Mr. Barnes has lived a quiet, law-abiding life in Baltimore.

Mr. Barnes' experience belies Arizona's claim, Brief of Pet. at 14, that the combination of the rule of *Haines v. Kerner*, 404 U.S. 519 (1972), requiring a "liberal 'notice' standard for evaluating papers filed by *pro se* litigants, *id.* at 520, and 28 U.S.C. §1915(d), permitting courts to seek counsel for *pro se* litigants, acts to assure that truly meritorious prisoner claims, once they arrive at the court house, will receive a fair hearing. On the contrary, the experience of PAP is that prisoners are not accorded counsel by the federal courts until their cases have survived the voluminous "Motion to Dismiss or, in the Alternative, Motion for Summary Judgment" filed in almost every case by the Maryland Attorney General's Office. Often, it is not until this juncture that the merits of a case are recognized, and counsel is sought by the court for the *pro se* prisoner.

III. In State Courts, Pro Se Prisoners Face Daunting Procedural And Substantive Obstacles In Litigating Their Claims.

In Maryland courts the prisoner can take little solace from Petitioners' claim that either the courts or the law will save him from his ignorance or illiteracy. Many prisoner claims which invoke common law, the Maryland Constitution and law, as well as federal law, are properly asserted in state court and, in fact, some claims which implicate serious and fundamental rights, such as loss of parental rights, are without the jurisdiction of the federal courts. Nevertheless, the unschooled, unassisted prisoner litigant may fare even less well in the state system. Here there is no counterpart to

Haines v. Kerner, supra. Maryland law, to the contrary, holds the *pro se* litigant to the same standard as the opposing party's attorney for the reason that the rules "apply to laymen and lawyers alike." *Tretick v. Layman*, 95 Md. App. 62, 68, 619 A.2d 201, 204 (1993). "In short, the Maryland Rules of Procedure, the Rules of Evidence, the burdens of proof, production, and persuasion are *party-based*, not attorney-based. There are no separate rules for attorneys and for parties." *Id.* at 78, 619 A.2d at 209 (emphasis in the original). In *Tretick*, the *pro se* litigant's appeal was dismissed because of his failure to properly present his appeal and to preserve alleged errors for review. In some instances PAP has been able to assist the *pro se* inmate in overcoming this burden. *See, e.g., Torbit v. State of Maryland*, 102 Md. App. 530, 650 A.2d 311 (1994). In *Torbit* PAP represented a prisoner who had been refused a waiver of filing fees in his *pro se* petition for name change for religious reasons. The state's appellate court reversed the lower court's policy of routinely denying fee waivers in such cases without providing a statement of reasons. With the cooperation of the administrative judge, PAP has now developed a packet of forms, affidavits, notifications to interested parties, and other materials for use by the court in prisoner name change cases.

Finally, the Maryland prisoner litigator must obtain representation or assistance of counsel on his or her own. Under Maryland law there is no provision comparable to that of §1915(d) empowering a court to seek counsel for a *pro se* litigant's meritorious case. Prisoners' motions for appointment of counsel addressed to state courts go unanswered, or are answered in the negative.

PAP is working with a *pro bono* umbrella organization and the Maryland courts to encourage judges faced with meritorious *pro se* claimants to call upon volunteer organizations to provide counsel on short notice. For the prisoner litigant who has not found the way to PAP, this means he or she must, in the first instance, satisfy a court that the cause is meritorious, and then meet volunteer counsel for the first time, in the lock-up, on the day of trial.

IV. Without Legal Assistance, Illiterate and Ignorant Prisoners Are At A Severe Disadvantage Compared To "Ordinary Residents".

Petitioners, without foundation, assert that the relief ordered by the Arizona district court provides to prisoners access far exceeding that available to "ordinary residents". Pet. Brief at 11. An examination of the resources available to the "ordinary resident" not only serves to dispel this popular misconception but also to point up the impediments to meaningful access inherent in incarceration.

The 1993/94 Directory of Legal Aid and Defender Offices lists 108 pages of civil legal aid and 25 pages of special needs organizations which provide free legal advice and representation for eligible poor people living in every state in the nation. Also readily available to persons living in the community who do not have the ability to hire legal counsel are the facilities of the state and federal court clerks offices. There the clerks routinely advise *pro se* litigants on filing procedures, distribute legal forms utilized in the jurisdiction, provide sample pleadings, and give other non-legal advice.

Maryland public libraries stock large collections of law books and other reference materials and will obtain those items not available on their shelves through inter-library exchange programs. Law school libraries as well as city, county and state bar libraries are open to *pro se* litigants.

In addition to these resources available to the non-incarcerated *pro se* litigant, Maryland courts have instituted a *pro se* divorce program which provides: 1) domestic pleading forms on request to *pro se* litigants; 2) lawyers and law students available within urban courthouses to advise litigants in completing the forms; 3) a state-wide hotline staffed by lawyers; and 4) program oversight by judges and masters.

In Maryland a growing number of community groups and legal organizations provide an extensive variety of legal services to all segments of the resident poor population. A compendium published by the People's Pro Bono Action Center and the Maryland State Bar Association lists over 70 legal services organizations, supported by federal and state agencies, religious organizations, private foundation grants, and private contributions.

In addition to the Bureau, which provides general civil legal services throughout the state, several of these smaller organizations offer legal services in specialized areas of expertise to such groups as the physically and mentally handicapped, the homeless, abused and neglected children, battered spouses, homeowners threatened with loss of their homes, tenants with landlord-tenant problems, children in need of special education services, immigrants, mothers in need of child support, persons with AIDS, and groups

suffering systemic harm through government or private action. The Maryland Volunteer Lawyers Service matches poor clients to lawyers who serve *pro bono* or at reduced rates. The two Maryland law schools have active student clinics which provide legal services in the areas of health law, family law, mediation of legal problems, environmental law, civil rights and constitutional law.

None of these services is available to inmates of the state's prisons (or even to persons on home detention or work release who are not granted permission to extend their trips in the community to court houses or lawyers' offices). Lawyer referral and *pro bono* programs are unable to obtain representation for prisoners. Only one group other than PAP provides legal assistance to Maryland prisoners with uncontested family law issues. The isolated prisoner claimant is not on an equal footing with anyone litigating outside of prison, and in order that those handicapped by incarceration as well as by ignorance and illiteracy achieve at least meaningful access to courts and administrative agencies they must be accorded the assistance of legally trained advisers.

CONCLUSION

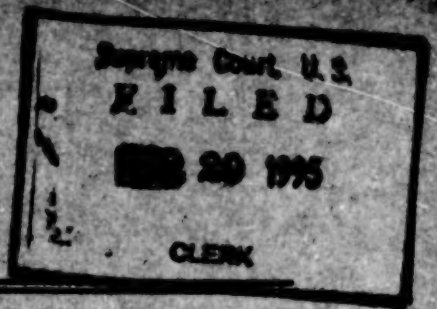
In support of the position of the Respondents, *amicus* asks that the judgement of the Court of Appeals be affirmed.

Respectfully Submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SAMUEL LEWIS, et al.,

Petitioners,

v.

FLETCHER CASEY, JR., et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICUS CURIAE
PRISON LEGAL SERVICES OF MICHIGAN
IN SUPPORT OF RESPONDENTS

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70 pp
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INTEREST OF AMICUS CURIAE

Prison Legal Services of Michigan (PLSM) is a private non-profit corporation with an office at the State Prison of Southern Michigan staffed by a supervising attorney and prisoner paralegals. It has been funded by the Michigan Department of Corrections since 1978 for the purpose of assisting prisoners in obtaining access to the courts. PLSM is familiar with the tasks prisoners must perform to seek various judicial remedies and with the difficulties they face in doing so. PLSM has appeared as amicus in litigation

regarding the assistance Michigan corrections officials must give prisoners who are unable to use law libraries or are prohibited from doing so. See Knop v Johnson and Hadix v Johnson, 977 F.2d 996 (6th Cir. 1992).

SUMMARY OF ARGUMENT

It is undisputed that prisoners who are illiterate, non-English speaking or confined to segregation units cannot use law libraries to obtain meaningful access to the courts. Such access is uniquely critical to prisoners whose only means of challenging either the fact of or the conditions of their confinement lies with

the courts. The suggestion that prisoners need only tell a simple story that can be written down by any literate fellow prisoner is badly misleading. State court postconviction procedures are often complex and may involve rigid deadlines. Federal district courts are well situated to assess the combined impact of state pleading requirements and state prison regulations on the ability of prisoners to seek judicial relief. Where access is effectively being denied, they should retain the flexibility to fashion realistic remedies. Special deference to prison administrators is not warranted where the decisions to be made

are matters of judicial expertise.

Judges are responsible for protecting the prisoner's right to get to the courthouse door. Defining how and to what extent that right should be implemented is a function that should not be delegated to prison administrators.

ARGUMENT

WHERE COMPLEX CHARACTERISTICS OF BOTH STATE PRISON AND STATE COURT SYSTEMS INTERACT TO DENY ILLITERATE, NON-ENGLISH SPEAKING AND SEGREGATED PRISONERS MEANINGFUL ACCESS TO THE COURTS, FEDERAL JUDGES MUST RETAIN THE ABILITY TO FASHION REASONABLE AND REALISTIC REMEDIES.

Corrections administrators concede that law libraries are useless to prisoners who can barely read and write English, as well as

to prisoners who are denied physical access to them, but, they say, it is not a problem they need to address. Without actually knowing how great the need is, how many competent jailhouse lawyers there are, or even what "adequate" legal assistance is, they assume that illiterate and non-English speaking prisoners can get adequate legal assistance from other prisoners. They claim that a prisoner need only "tell a story" and a kindly judge will clarify the issues and appoint counsel if there is a hint of merit. They repeat like a mantra the observation made by this Court in Turner v Safley, 482 U.S. 78 (1986), that running prisons is a difficult business and that courts should

show appropriate deference to the judgment of prison administrators.

Prisoners stress that the "meaningful" access required by Bounds v Smith, 430 U.S. 817 (1977) must include the ability to meet the actual threshold requirements of the courts that review civil rights claims and petitions for postconviction relief. Having to function in a world where all the minutiae of daily life are regulated, they struggle to make outsiders understand that the inability to complete even simple tasks in a timely manner may cost them the opportunity for judicial review. Meeting deadlines is hard when getting photocopies or postage disbursements can take days, telephone calls

must be collect, and fax machines are out of the question. Researching a legal issue is difficult if one can only spend a few hours a night in the library or request a few books at a time from the shelves. Drafting intelligible pleadings is hopeless if one reads English at the fifth grade level. Even utilizing assistance from other prisoners may be impossible if one does not speak English at all.

To the prisoner, access to the courts is not a luxury. Since incarceration is a direct result of court action, and changes in the length or conditions of incarceration can also come about only through court action, access to the courts is a basic need in the

prison environment. Indeed, it is the only means prisoners have to protect themselves against the consequences of mistakes, negligence or deliberately harmful action by state officials. The needs of prisoners can not be compared to those of free people who are illiterate or non-English speaking since such people, by definition, have no need to challenge the fact, length or conditions of incarceration.

It is true that corrections officials do not create illiteracy, but prisons attempt to correct or cope with such conditions all the time. They provide education to the illiterate, treatment to the mentally ill, and medical care for preexisting injury and

disease. With some prison budgets swollen beyond the billion dollar mark, the relative cost of training and supervising prisoner legal assistants is minuscule. Implementing such programming is no more difficult than running prison industries or vocational training classes.

In determining whether prisoners are being afforded meaningful access, three questions are relevant:

1. What tasks must a prisoner perform to obtain access?
2. How capable are prisoners of performing those tasks?
3. Who is responsible for insuring that all prisoners receive the assistance necessary to obtain meaningful access?

Answering these questions requires concrete information about state court procedural requirements and about the resources available to state prisoners. Amicus hopes that this description of what access means in Michigan will provide a useful example.

A. MICHIGAN POSTCONVICTION PROCEDURE

1. Establishing A Realistic Context

Federal courts naturally view access in terms of the pro se pleadings they commonly see -- habeas corpus petitions and civil rights actions under 42 U.S.C. § 1983. They are familiar with the forms the district courts distribute for initiating such cases. They know that a sufficiently clear recita-

tion of facts indicating a civil rights violation may, standing alone, persuade a court to provide counsel in a § 1983 case, especially since substantial attorney fees may be awarded to prevailing plaintiffs. State officials reinforce this view. They emphasize that a right to appointed counsel exists for the direct appeal from the prisoner's conviction and assert that the court access sought "is largely for the purpose of filing federal habeas corpus petitions and civil rights actions." Petitioner's Brief at page 20, fn. 9.

This image of the pleadings to be filed minimizes the need for assistance by underestimating the complexity of the work

involved. For instance, Petitioner's Brief asserts at page 26:

"Under the 'notice pleading' system, courts apply the law liberally, regardless of whether inmates have cited appropriate legal authorities, presented legal analyses, or correctly identified their claims. Inmates primarily need to present the facts underlying their claims, for which they can rely on their personal knowledge. The facts do not even need to be presented completely or precisely, as courts liberally grant leave to amend or appoint counsel when presented with ambiguous factual allegations that suggest a meritorious claim." (fn. Omitted)

The only problem with this utopian view is that it has little to do with the reality prisoners face, especially in pursuing postconviction relief. Beyond the admitted fact that even simplified forms are useless

to a person who cannot sound out the words on the page, there are many other hurdles to be surmounted in the state courts before a federal habeas petition becomes a relevant option.

Most obvious is the exhaustion requirement. Any state procedures that may be available for resolving a federal constitutional claim must be utilized, regardless of whether the prisoner has a right to counsel in connection with those procedures. Rose v Lundy, 455 U.S. 509 (1982). Less obvious are the barriers that may prevent prisoners from having all their federal claims raised when they should be -- on the direct appeal from the conviction.

These include improper decisions to deny the appointment of counsel in particular cases; limitations on the right to counsel in whole classes of cases; representation by lawyers who are inexperienced, overworked, or outright incompetent; highly detailed pleading requirements, and increasingly restrictive appellate court rules designed to control and expedite appellate court dockets. The Michigan system for postconviction review illustrates these difficulties.

2. The Appeal of Right

Until recently, every Michigan defendant convicted of a felony was entitled to an appeal of right. To preserve this right,

indigent defendants must request counsel within 42 days of sentencing. A trial court order granting a timely counsel request doubles as a claim of appeal and is sent directly to the Court of Appeals, which opens a file and tracks the progress of the case. MCR 6.425(F).

Counsel requests made after 42 days, but within the 18-month period for seeking appeal by leave, were to be "liberally granted". MCR 6.425(F)(1)(b). However, orders appointing counsel in such cases are not sent to the Court of Appeals and tracked on that Court's computer system. Neglect by an appointed attorney to file a leave application does not become visible like the

failure to file a timely brief in a claim case does.

Given that 58 Michigan trial courts appoint appellate counsel in an average of nearly 5,700 cases annually, even this liberal assignment system left a lot of room for human error. Some defendants lose request forms, fail to complete them properly, return them late, or depend unsuccessfully on others to mail them. Some court clerks misfile requests that go undiscovered for months or years. Some circuits attempt to save the cost of assigned counsel by ignoring the "liberally grant" standard for late requests, thereby requiring pro se prisoners to litigate their right to

have counsel appointed¹. Other defendants are denied counsel on the ground that they are not indigent. Thus, even the process of obtaining counsel where the right exists can require prisoners to complete forms correctly, correspond with courts, and file full-blown applications for leave to appeal.

When attorneys fail to file timely briefs on behalf of indigent clients in appeals of right, the Court of Appeals sends warning notices, imposes fines and, if warranted, directs the appointment of substitute counsel. MCR 7.217. In leave

¹ See People v Cottrell, 201 Mich App 256; 506 N.W.2d 12 (1993) (noting that issue had arisen repeatedly and finding abuse of discretion in denying counsel solely for lateness of request).

cases, where there is no tracking system, the opportunity for direct appeal can be lost altogether if an application is not filed within the deadline. MCR 7.205(F)(3). Thus, a prisoner who has had counsel appointed in response to a late request, but has not heard from the lawyer promptly, must attempt to insure that his or her case is not being neglected and to obtain the appointment of substitute counsel, if necessary.

Three major changes made within the last year have made the Michigan system far less liberal. In November, 1994, voters approved a ballot proposal that requires appeals in all guilty plea cases to proceed by leave, rather than by right. Thus, regardless of

when counsel was requested, plea appeals will not be tracked on the Court of Appeals computer unless and until an application for leave is filed. Two-thirds of all assigned appeals arise from plea-based convictions. Whereas previously about ten percent of all assigned appeals were leave cases because of late counsel requests, now over 3,000 indigent defendants a year (the vast majority of them prisoners) will be left without Court of Appeals oversight to make sure that their appeals are not being neglected.

The second change is a court rule amendment that will substantially increase the chance that appeals by leave, plea-based or otherwise, will in fact be neglected.

Effective November 1, 1995, the deadline for filing leave applications will be reduced from 18 months to 12 months. Admin. Order 1993-46, entered 3/3/95. This includes all the time needed for transcript preparation, research and the litigation of any issues that must be raised first in the trial court. Given the double whammy of shorter due dates and no back-up tracking system, more appointed attorneys will inevitably miss deadlines, leaving their clients to try to pick up the pieces.

The third change will result in some indigent prisoners not having counsel for a direct appeal at all. Since passage of the ballot proposal regarding plea appeals,

debate has arisen as to whether these cases are now discretionary appeals that do not require the appointment of counsel under this Court's holding in Ross v Moffitt, 417 U.S. 600 (1974). The Michigan Supreme Court has taken two steps toward resolving this debate. It has invited the Legislature to take a position on the matter, pending the Court's own ultimate decision. And it has amended the court rule [MCR 6.425(F)(1)(c)] on an interim basis to require that requests for appointed counsel in plea cases be "liberally granted" if made within 42 days of sentencing. There is no requirement that late requests be granted at all. Admin.

Order 1994-55, entered 12/30/94; effect continued 6/19/95.

In the short run, guilty-pleading prisoners will have to pursue their initial appeals without legal assistance if they fail, for whatever reason, to request counsel on time. Even if they do make timely requests, these prisoners may have to litigate their right to have those requests "liberally granted". And, depending on the resolution of the ultimate question, thousands of prisoners each year may be told that if they wish to appeal from plea-based convictions and sentences, their only choice is to represent themselves.

3. The Appellate Assigned Counsel System

Fewer than twenty percent of assigned appeals in Michigan are handled by a state-funded appellate defender office. The rest go to private practitioners who join a state-administered roster. The Michigan Appellate Assigned Counsel System (MAACS) maintains the roster and oversees trial court compliance with an appointment process that promotes the equitable distribution of cases to qualified counsel. New roster members must attend a two-day orientation program on criminal appellate practice that includes such topics as appellate court rules, issue identification and postconviction trial court

motions. Roster attorneys also receive substantial reference materials geared specifically to Michigan criminal appeals.² However the trial courts are responsible for payment. Appellate assigned counsel fees vary widely but are generally low, making it difficult to attract and retain well qualified roster members.³

MAACS also attempts to enforce compliance with twenty minimum performance standards approved by the Michigan Supreme Court in 1981. The standards define the steps assigned counsel should take in representing

² Michigan Appellate Assigned Counsel System, A Decade of Challenges (Lansing, 1995) pp. 8, 22-25.

³ Id. at 8, 15-16.

indigent clients on appeal. These include meeting all deadlines, investigating off-record issues and raising all claims of arguable merit.⁴

Because MAACS lacks the staff to routinely review even a sample of all roster attorney assignments, the quality control process is primarily complaint driven. MAACS receives several hundred letters a year from indigent prisoners who believe their cases are being neglected or that their lawyers are failing to raise meritorious claims of error. Some of these complaints are unfounded, but many are not. Over 50 lawyers have been

⁴ Id. at Appendix.

removed from the roster or resigned under investigation for such conduct as neglecting dozens of cases, failing to communicate with their clients, repeatedly filing the same "canned" briefs, and failing to raise meritorious issues that had been preserved on the record by trial counsel.⁵ When it

⁵ Id. at 18. See also, People v Smith, 158 Mich App 220, 405 N.W.2d 156, lv. den. 428 Mich 903 (1987) (reversing murder conviction on second appeal based on issues missed by ineffective prior appointed counsel) and People v Michael Anderson, 442 Mich 882; 500 N.W.2d 478 (1993) (remanding to the Court of Appeals for appointment of new appellate counsel where counsel handling already completed appeal of right was ineffective). Where there is a disagreement between lawyer and client about whether a claim the client wishes to raise has merit, the client can choose to file a pro se supplemental brief. See People v Dukes, 189 Mich App 262; 471 N.W.2d 651 (1991). The minimum performance standards require the lawyer to provide enough clerical assistance to make such a brief acceptable for filing, but the client must research and draft the substance. Prisoners must also reply on the merits, within court-ordered deadlines, when their lawyers seek to withdraw

appears that a lawyer may be providing inadequate representation on a regular basis, MAACS reviews all of that lawyer's pending assigned appeals. Such analysis invariably reveals clients have been harmed who have never complained.⁶

When MAACS removes an attorney from the statewide roster, it attempts to obtain substitute counsel for clients whose cases are still pending.⁷ It cannot help former clients whose convictions have already been affirmed by the Court of Appeals. No matter

pursuant to Anders v California, 386 U.S. 738 (1967) because the lawyer can find no meritorious issues to appeal. MCR 7.211(C)(5).

⁶ A Decade of Challenges, fn. 2, supra, at 18.

⁷ Id. at 19.

how egregious the removed attorney's conduct was, or how meritorious missed issues may have been, once the Court of Appeals has acted the right to appointed counsel no longer exists.

In sum, even prisoners who have appointed counsel for their direct appeals may have to research issues themselves and reduce their arguments to writing. The extent to which those arguments must be framed as precise legal issues, replete with citations to authority, depends on whether the prisoner is responding to an Anders motion, trying to persuade MAACS to investigate unraised claims, or filing a formal supplemental brief. Nonetheless, in

each of these situations the prisoner, who may not even have a copy of the trial court transcript, much less specialized training and reference materials, has to overcome the presumption that the lawyer who has chosen not to raise the issue must be correct.

4. Supreme Court Applications

The scope of assigned appellate counsel's responsibilities in Michigan does not include seeking leave to appeal to the state Supreme Court if the Court of Appeals denies relief. MCR 6.425(F)(1)(d). Until April 1, 1990, MCR 7.303 permitted indigent prisoners to seek Supreme Court review by submitting what became known as "letter

requests". These letters required only the defendant's name and address, the Court of Appeals docket number, and the date of the decision being appealed. So long as the letter was submitted within 56 days of that decision, the Supreme Court would review the entire Court of Appeals file. If it was concerned about the propriety of the Court of Appeals decision, the Supreme Court could direct the appointment of counsel to prepare a full-blown application for leave or order the prosecution to show cause why the conviction should not be reversed.

While letter requests lacked the advantage of advocacy by counsel, they did provide ready access to the Supreme Court.

Anyone who could read and write could help an illiterate prisoner draft a simple letter. Segregated prisoners were not disadvantaged by their inability to use a law library. The opportunity to obtain relief, or at least to exhaust state remedies, was real. However, as the prison population exploded, so did the Court of Appeals docket. Inevitably, the growth in appeals pushed its way into the Supreme Court as well.

The Court responded by rescinding the letter request procedure. Admin. Order 1989-28, entered 1/26/90. It did not expand the scope of assigned appellate counsel's responsibilities to include seeking leave to appeal adverse Court of Appeals decisions.

Now indigent prisoners must prepare leave applications under MCR 7.302, the same rule that governs pleadings prepared by lawyers.

A Supreme Court application must identify each issue the prisoner wants the Court to consider and explain why it meets one of several grounds for Supreme Court review. The Court of Appeals decision must be attached, along with an affidavit of indigency and proof of service. The Court of Appeals brief should be attached as well. Indigent prisoners need file only one copy of the application, instead of eight, and the Court accepts a fill-in-the-blanks style form that helps prisoners structure the information they must provide. However the

56-day filing deadline continues to be strictly enforced.

As Justice Charles Levin explained in his dissent to Keen v Thumb Correctional Facility Warden, 444 Mich 871; 509 N.W.2d 148 (1993), the Supreme Court Clerk is forbidden to accept applications received so much as one day late. The Court has repeatedly refused to consider applications even from prisoners who proved that they were not told of the Court of Appeals decision by their assigned counsel until the 56-day period had expired. Thus, whether the prisoner is uninformed or is simply unable to file an application on time because of illiteracy, segregation status, a sudden transfer or

copying problems, the opportunity to seek Supreme Court review is lost -- and with it goes the ability to exhaust state remedies.

5. Motions for Relief from Judgment

Until 1989, a prisoner who had never had an appeal, or who needed to do a second appeal in order to litigate unraised issues or federalize issues raised only on state grounds, did not face significant procedural constraints. Delayed motions for new trial could be filed in the trial court at any time.

In that year, Michigan adopted Subchapter 6.500 of the Michigan Court Rules to establish a procedure for postappeal

proceedings in criminal cases. The new "Motion for Relief from Judgment" became the exclusive means to challenge a conviction for a defendant who has had an appeal by right or leave, sought leave to appeal and been denied, or has never had an appeal but cannot seek leave because the application period has expired. The applicable rules are patterned after those governing proceedings under 28 U.S.C. § 2255.

The required form of a Motion for Relief is set forth in MCR 6.502. In addition to basic identifying information, the prisoner must provide a detailed procedural history of the case, including all prior attempts to obtain postconviction relief and the name of

each lawyer who represented the defendant at every stage of the case from the time of arrest. The prisoner must describe:

- (11) The relief requested;
- (12) The grounds for the relief requested;
- (13) The facts supporting each ground stated in summary form;
- (14) Whether any of the grounds for the relief requested were raised before; if so, at what stage of the case, and, if not, the reasons they were not raised.

When an issue could have been raised on appeal but was not, the prisoner must show both good cause as to why it was not raised previously and actual prejudice from the alleged irregularity. MCR 6.508(D). The

only exception is for jurisdictional defects. The trial court may waive the "good cause" requirement if it believes the prisoner may actually be innocent.

This is not an exercise in simple storytelling. The prisoner must conceptualize the facts as legal issues and provide authority to demonstrate that these issues constitute grounds for relief. Unlike the situation with pro se Supreme Court applications, there is no Court of Appeals brief prepared by counsel on which the prisoner can rely. On the contrary, in a motion for relief from judgment the issues are, by definition, ones that have not been briefed before. And, of course, they must be

conveyed persuasively enough to overcome norms against granting delayed or repeated appeals.

MCR 6.505 permits the trial court to appoint counsel in connection with a motion for relief from judgment, but requires counsel only if the court desires oral argument or an evidentiary hearing. In fact, counsel is appointed rarely. The vast majority of motions for relief are summarily dismissed under MCR 6.504(B)(2).

In addition to the inherent difficulties motions for relief present to prisoners who are segregated or not literate in English, the Michigan Supreme Court recently created two more. First, on June 2, 1995, the Court

amended MCR 6.502 to state emphatically that: "after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction." The only exceptions are for retroactive changes in the law or newly discovered evidence.

As a result of this amendment, prisoners who submit inadequate motions for relief will never have a chance to correct their mistakes. Even if they are subsequently able to obtain competent lay assistance or to retain counsel who discovers clear reversible error, they will have no procedural avenue available for raising previously unraised issues. And, of course, if the unraised issues are of constitutional dimension, the

prisoners will never be able to raise them in federal court either because they will be unable to exhaust their state remedies.

Prisoners who lack adequate assistance must effectively choose between not filing motions, for fear of doing a bad job and wasting their only opportunity, or doing the best they can on their own and in fact wasting their only opportunity.

The second new hurdle was erected in People v Reed, 449 Mich 375; 535 N.W.2d 496 (1995). There the Court held that a failure of assigned appellate counsel to raise an issue of arguable merit on the prisoner's appeal of right does not necessarily constitute "good cause" that permits raising

the issue in a motion for relief from judgment. In order to show good cause, the prisoner must demonstrate that failure to raise the issue constituted ineffective assistance of counsel as defined by this Court in Strickland v Washington, 466 U.S. 668 (1984), or that some external factor prevented counsel from raising it. Thus, the prisoner who has already lost the opportunity to have a viable claim of error considered on direct appeal must, in order to have that claim considered in a motion for relief, first litigate the question of whether assigned counsel's failure to raise it resulted from mere error or inadvertence or

rose to the level of constitutionally cognizable incompetence.

A motion for relief from judgment is the only recourse available to prisoners in the following situations:

- where an indigent prisoner, convicted at a trial, failed to request counsel within 12 months of sentencing and to file a pro se Court of Appeals application for leave within that time;
- where an indigent prisoner, convicted by plea of guilty or nolo contendere, failed to request counsel within 42 days of sentencing and to file a pro se Court of Appeals application for leave within 12 months;
- where the direct appeal was by leave (all plea appeals and trial appeals with late counsel requests) and counsel neglected to file an application within 12 months; and

- where a brief on appeal or application for leave was filed, either by counsel or by a prisoner proceeding in pro per, and meritorious issues were overlooked.

It is impossible to estimate how many hundreds of illiterate, non-English speaking or segregated prisoners presently fall into one of these categories annually. There is no question that if the right to counsel for plea appeals is eliminated altogether, there will be many hundreds more.

B. THE ABILITY OF MICHIGAN PRISONERS TO PERFORM THESE TASKS

Two separate class actions resulted in federal district court findings regarding access to the courts by prisoners at selected

Michigan facilities. In Knop v Johnson, 667 F.Supp. 467 (W.D. Mich. 1987), Judge Richard Enslen concluded that inmates who could not use law libraries for such reasons as illiteracy, and inmates in segregation who were not permitted to use the main law libraries, were denied access. In Hadix v Johnson, 694 F.Supp. 259 (E.D. Mich. 1988), Judge John Feikens reached similar conclusions.

These cases were consolidated on appeal. Knop v Johnson and Hadix v Johnson, 977 F.2d 996 (6th Cir. 1992). The remedies in both were rejected as overly broad and both were remanded to Judge Enslen for "reshaping". However, the Court of Appeals accepted the

factual findings of the district courts, which include the following.

Both indigency and illiteracy are widespread. Twenty percent of prisoners at the State Prison of Southern Michigan's Central Complex "are totally illiterate and cannot read". Fifty percent are functionally illiterate and "unable to comprehend basic, written legal resources offered in the Central Complex library system." The average prisoner can read and comprehend at only a sixth grade level. Common legal materials require reading levels of grade 14 or higher.

Hadix, supra at 259, 269, 283

Eighty-two percent of Central Complex prisoners had less than \$80 in their prison

accounts to use for buying personal hygiene items, postage, and other necessities. These prisoners could not afford to retain attorneys or to pay other prisoners to help them with legal problems. Hadix, supra at 283.

When it comes to using the prison law libraries, even prisoners in general population are left pretty much on their own. Neither the civilian law librarians nor their inmate clerks are trained or expected to assist any prisoners with legal research or drafting. Hadix, supra at 283-284; Knop, supra at 488, 491.

Prisoners in various segregation units are at an even greater disadvantage because they have no direct access to law libraries.

Segregated prisoners may request three to five books at a time, three to five days per week, from the prison's main law library. If the requested volumes are not in use, the books are delivered and may be kept by the segregated prisoner until they are picked up the next day. This system assumes, of course, that prisoners know precisely which books they need. Hadix, supra at 283; Knop, supra at 489-490, 491.

Segregated prisoners also may use, for two hours a week, a mini-law library located in a segregation unit cell. Judge Enslen characterized these small collections of books as "pathetically inadequate". Knop, supra at 490. Any assistance from other

prisoners is usually unavailable. When the District Court findings were made, about 1,200 of the 2,400 Central Complex prisoners and 344 of 606 prisoners at the Marquette Branch prison were held in segregation.

Hadix, supra at 283; Knop, supra at 470.

Assistance from jailhouse lawyers is not a reliable means of providing access to the courts. As Judge Enslin observed: "... the often-fabled jailhouse lawyers or writers are, at least in the Michigan system, too few and often too uninformed to provide adequate assistance to the inmates." Knop, supra at 488. Few of the prisoners who call themselves jailhouse lawyers actually possess even rudimentary legal skills, and there is

no procedure for monitoring the quality of their work. Most violate prison rules by charging substantial sums for their services.

They are not permitted extra law library time to work on other prisoners' cases, and they are not permitted to possess their "clients'" legal papers without obtaining a DOC legal assistance agreement form, a document that is in fact rarely available. Legal papers are exchanged nevertheless and may be separated permanently from their owners when either the jailhouse lawyer or the client is transferred. Hadix, supra at 284; Knop, supra at 488-489, 490, 491.

The only other assistance available to indigent prisoners in situations where there

is no right to appointed counsel is Prison Legal Services of Michigan (PLSM). A private non-profit corporation that was started with American Bar Association grants in the 1970's, PLSM began receiving Department of Corrections funding in 1978. It is authorized to provide services only to prisoners at the State Prison of Southern Michigan which, over the course of a year, houses 10,000 different prisoners. It was contractually prohibited from assisting prisoners in civil rights actions against the DOC. Its staff consists of fewer than two full-time attorneys and three or four prisoner paralegals. In 1982, Judge Feikens issued an injunction that continued funding

of \$118,700 per year. Knop, supra at 486; Hadix, supra at 261, 273, 285.

There was substantial testimony in Knop from prisoners who were unable to get to law libraries, or to find the books they needed in time to prepare pleadings and answers, or to understand the contents of the books if they found them. Id at 492. In concluding that prisoners in such circumstances were being denied meaningful access to the courts, Judge Enslen observed:

"As a district court judge who has reviewed and decided numerous prisoner complaints and petitions, I know that many inmates do not respond to Reports and Recommendations and court orders. Because of the evidence I considered in this case, I have a deeper appreciation of the difficulties inmates face in filing a meaningful complaint and in

defending the validity of that complaint." Knop, supra at 495.

Since the district court testimony was taken eight or more years ago, some things have changed. There is no reason to believe that Michigan prisoners are any less indigent or any more literate, but there are many, many more of them. In 1986, Michigan had 13 prisons and a camp program with a total of 18,836 prisoners. By December, 1994, there were 40 prisons and 16 camps housing 38,145 prisoners.⁸ The DOC operating budget alone has grown from \$500 million in 1986 to \$1.3

⁸ Michigan Department of Corrections, 1994 Statistical Report (Lansing, 1995), pp. 71-77.

billion in 1995. PLSM's size and funding remain the same.

Of the current prisoner population, 3,342 are confined in segregation units that do not permit direct physical access to law libraries. An unknown but rapidly increasing number do not speak much English. Because of changes in Michigan's juvenile waiver laws, annual commitments now include nearly two hundred new prisoners who were aged 15 or 16 when their crimes were committed.⁹

⁹ Michigan Department of Corrections, Office of Planning, Research and Management Information Services, Data Points (Lansing, Summer 1995) p. 2.

C. THE JUDICIAL ROLE IN PROTECTING
ACCESS

Providing prisoners with the means to access the courts effectively is not a question of what can be done, but of who should decide what must be done. Access to courts is an area where deference to prison officials is not required for three reasons.

First, it is not an area where they have expertise. It is judges, not wardens, who understand the mechanics of legal research, the significance of missed deadlines, the complexity of state exhaustion requirements, the intellectual difficulty of translating particular facts into recognizable legal theories, and the exceptional showing the pro

per petitioner must make to have counsel appointed. While courts can take testimony to assess the reasonableness of time, place and manner restrictions imposed in the name of prison security, corrections officials have no basis for deciding how much legal assistance is enough.

Second, this is an area in which the role and authority of the courts are at issue. It is courts that have the constitutional responsibility to insure that their doors are open to all citizens and, in particular, to protect the rights of individuals against misuse of power (whether deliberate or inadvertent) by the state. To the extent that mistakes have been made by

lower courts, it is the judiciary's job to correct them. The fact that a right to appointed counsel only exists for the first direct appeal does not suggest that other means of enabling prisoners to seek judicial review are unimportant. On the contrary, absent a right to counsel, other means become even more important. Courts may need to protect their own dockets against the frivolous or repetitive claims of some overly litigious prisoners, but they can apply their own rules and sanctions for this purpose.

Certainly courts should not control their dockets by delegating to prison administrators the effective authority to deny court access to large groups of prisoners on

grounds no more related to merit than the would-be petitioner's literacy in English.

To the extent that prisoner claims concern prison conditions, the third reason for withholding excessive deference becomes apparent. Corrections officials have obvious self-interest in avoiding suit. Indeed, the more substantial a potential civil rights claim might be, the more incentive a corrections department has to protect itself from judicial scrutiny.¹⁰ It is dangerously circu-

¹⁰ While state officials issue press releases about frivolous prisoner complaints, this Court can take judicial notice of the fact that current efforts to "get tough" on prisoners are likely to result in an increasing number of serious civil rights violations. See, for instance, the recent front-page article in the National Law Journal which described how a prisoner on an Alabama chain gang was chained to a pole with his arms over his head for ten hours after having an epileptic seizure.

lar for courts to abdicate to the state responsibility for deciding which prisoners will be given the means to seek judicial redress from an exercise of state power on

Morrison, "The New Chain Gang", Nat'l. L.J., Aug. 21, 1995, p.A1.

In Michigan, the Department of Corrections recently took steps to revise drastically prisoner visitation rules that have been effective for decades. Among many controversial provisions are a ban on visits by siblings younger than 18 and a grant of total discretion to wardens to deny placement of any visitor on a prisoner's approved list. When a legislative oversight committee, which is required by state law to review proposed administrative rules, refused to approve these rules as drafted, the governor declared the state law unconstitutional and ordered the rules adopted. These events have led to litigation in state court regarding the constitutionality of Michigan's legislative veto [Blank v Michigan Department of Corrections, Jackson Circuit Nos 95-73300, 95-72477 (opin. issued 9/14/95), appeal pending (Mich. Ct. Of App. No. 188881)] and in federal court regarding the constitutionality of the visitation rules themselves [Bazetta v McGinnis, 95-CV-73540-DT (E.D. Mich. S.D., filed 8/22/95)].

the ground that exercising power is a tough job with which judges should not interfere.

Defining the adequacy of law libraries and of legal assistance for those unable to use libraries is not fundamentally a question of how to run a prison, but how to get a claim before a judge. The Turner test of reasonableness should apply only to prison regulations initiated for penological reasons that incidentally burden constitutional rights, such as limiting correspondence between prisoners (Turner) or restricting specific publications that might affect institutional security (Thornburgh v Abbott, 490 U.S. 401 (1989)).

Where the question is the scope of the state's affirmative duty to facilitate access to the judiciary -- the one constitutional right on which all others depend -- it is not the courts that are interfering with corrections departments. It is the other way around. Courts, too, must demand proper deference to their difficult and historic role. If prison officials, either directly or indirectly, are permitted to determine which prisoners get to the courthouse door, they will have effectively negated the ultimate judicial function in a government of checks and balances -- the power to review the legality of confinement.

CONCLUSION

Whether indigent prisoners have meaningful access to the courts depends on a complex interaction of factors in each state. The extent to which prisoners are unable to help themselves, because they cannot read and write English adequately or are denied physical access to libraries, is one factor. The extent to which prison officials help prisoners overcome these handicaps is another. A third factor is the quality and scope of the jurisdiction's system for providing appointed counsel for direct appeals and other forms of postconviction review. Where the right to counsel is narrow, or the

appointment process frequently fails to insure effective representation, prisoners are forced to depend more on their own resources to obtain judicial review of errors affecting their convictions or sentences. Finally, there is the manner in which courts themselves set the terms of access. Detailed pleading requirements, complex rules of practice and strictly enforced filing deadlines all make the task of representing oneself from a prison cell that much more difficult.

Faced with an access claim, a federal district court cannot only take testimony on all these factors. It can assess that testimony in light of its own familiarity with state practices and personnel. District

judges who gain experience over time with state appellate court rules, the responsiveness of corrections officials to civil rights violations generally, and even the membership of the local bar are in the best position to weigh these factors and measure the mix. And they can fashion remedies that are realistic, appropriate and workable.

Amicus recognizes that these remedies should not burden state prison officials unnecessarily. But inconvenience and cost must be weighed against the prisoner's right to seek judicial review of both the legality of his or her confinement and the constitutionality of the conditions of that confinement. State court dockets are badly over-

burdened; underfunded indigent defense systems are strained past their limits. Mistakes in individual cases are inevitable. Add to this the current trend of getting tough on crime by making prisons as "unpleasant" as possible, and it is apparent that the right of access to the courts is becoming ever more critical to ever more prisoners. Amicus Prison Legal Services of Michigan urges this Court to reinforce the flexibility of lower federal courts to fashion appropriate remedies that account realistically for all the factors that affect the ability of illiterate, non-English speaking and segregated prisoners even to knock on the courthouse door.

For the foregoing reasons, amicus respectfully urges the Court to uphold the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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16
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Supreme Court, U.S.

F I L E D

SEP 29 1995

CLERK

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995**

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Petitioners,

v.

FLETCHER CASEY, JR., *et al.*,

Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

**BRIEF OF AMICUS CURIAE NORTH
CAROLINA PRISONER LEGAL
SERVICES, INC.
IN SUPPORT OF RESPONDENTS**

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QUESTION PRESENTED

Is an illiterate or non-English speaking prisoner afforded meaningful access to the courts by the mere existence of a law library?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SAMUEL LEWIS, *et al.*,

Petitioners,

v.

FLETCHER CASEY, JR., *et al.*,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE
NORTH CAROLINA
PRISONER LEGAL SERVICES, INC.
IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

North Carolina Prisoner Legal Services, Inc.

(NCPLS) is a non-profit organization, established in 1978, that provides free legal assistance to North Carolina prisoners in all state and federal courts in North Carolina. NCPLS handles a majority of the litigation on behalf of prisoners in North Carolina, including cases challenging prison conditions and unconstitutional criminal convictions. Complaints of illiterate and non-English speaking prisoners are a priority of NCPLS.

The issue involved in this case--whether illiterate and non-English speaking prisoners should be provided legal assistance--is an issue of significant importance.¹ During the

¹One government study over two decades ago found that 82% of all prisoners had not completed high school and that 55% had not finished the first grade. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 2 (1967). These findings have been replicated in more recent times. *See, e.g.*, Raymond Y. Lin, Comment, *A Prisoner's Right to Attorney*

past 17 years, NCPLS has successfully represented numerous illiterate and Non-English speaking prisoners in civil constitutional claims and post-conviction claims.² It is for these reasons that NCPLS respectfully offers its assistance to the Court.

SUMMARY OF ARGUMENT

The core judicial inquiry in determining the constitutionality of an inmate access program is whether the legal assistance provided allows all inmates a meaningful opportunity to present claimed violations of fundamental

Assistance, 83 Colum L. Rev 1279, 1281 (1983)(citing a 1974 study by the Justice Department demonstrating that "nationally, there are large numbers of illiterate or semi-illiterate prisoners").

²Historically the illiteracy rate of North Carolina inmates has been extremely high. *Smith v. Bounds*, 610 F. Supp. 597, 604 (E.D.N.C. 1985), *cert. denied*, 488 U.S. 869 (1988). This was one of several factors that led the court to find that defendants' library system did not provide adequate access to the courts. Senior District Judge Dupree ordered defendants to provide inmates with assistance of counsel.

constitutional rights to the courts. Non-English speaking inmates and illiterate inmates are not afforded an adequate opportunity to present their claims to the court by the mere existence of a law library.

ARGUMENT

I. THE CONSTITUTION REQUIRES THAT ILLITERATE AND NON-ENGLISH SPEAKING PRISONERS BE AFFORDED MEANINGFUL ACCESS TO THE COURTS.

"It is now established beyond doubt that prisoners have a constitutional right of access to the courts." *Smith v. Bounds*, 430 U.S. 817, 821 (1977).³ In *Bounds*, this Court

³Although *Bounds* unequivocally recognized the right of access to courts, it was not as explicit on the source of the right. However, this Court has indicated that the right is found in the Fourteenth Amendment's guarantee of due process. *Procunier v. Martinez*, 416 U.S. 396, 419 (1974). Moreover, to the extent that it provides access to all inmates, not just those who can afford to hire attorneys, it is also an aspect of the equal protection clause. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987).

held that states have an affirmative duty to assist prisoners in presenting their claims to the court.

In the present case, after a three month bench trial, the court found that functionally illiterate prisoners and non-English speaking prisoners have had their claims dismissed with prejudice or have been unable to file legal actions. In accordance with *Bounds*, the Arizona district court ordered that legal assistance shall be provided to prisoners who because of language deficiencies are unable to perform adequate legal research and writing. *Casey v. Lewis*, 43 F.3d 1261, 1265 (9th Cir. 1994).

A. Examples of NCPLS representation to illiterate and non-English speaking prisoners.

Michael J. Roary, who has been deaf and mute for most of his life, is an inmate who has been confined at Sampson Correctional Center in Clinton, North Carolina since February 1993.

Hearing and speech loss, especially when it occurs in the early years of life, can result in problems learning spoken language which then leads to difficulties understanding the same language when it is written. As a result, Mr. Roary has a limited understanding of written English. American Sign language (ASL) and not English is the "native" language of Plaintiff.

ASL, as a language, is completely distinct from English in grammar, syntax, idioms and vocabulary. ASL sentences do not follow English sequential patterns. Thus, direct translation of English, as with written notes, into ASL will not necessarily convey the intended message. Similarly, much of English idiomatic speech is lost on the ASL user whose frame of reference for idiom is significantly different from that of a hearing person. No staff member or inmate at Sampson Correctional is certified by a recognized certification agency as a sign language interpreter.

Mr. Roary has been diagnosed with an ulcer and suffers from urinary, prostate, and intestinal problems. The North Carolina Department of Correction fails to provide Mr. Roary with an interpreter at routine medical visits, routine mental health visits, and during educational, instructional and religious programs. Consequently, Mr. Roary has difficulty communicating during medical and mental health visits and, in effect, is denied instructional, educational and religious programs. NCPLS has undertaken to represent Mr. Roary in his various claims.

In 1979 Mr. Joseph Elie Louissaint fled from Haiti, in fear of his life, and came to the United States. Mr. Louissaint had attended school in Haiti on an irregular basis through the third grade. School was conducted in French. He could not read, write, speak, or understand French. His native language is Creole. Mr. Louissaint did not know any English when he came to the United States and never had any formal

schooling in this country. He could not read or write in English and had only a minimal understanding of spoken English.

On October 18, 1988, he was arrested for possession of 2.6 grams of cocaine. Mr. Louissaint subsequently pled guilty and was sentenced to a three year prison term. Due to Mr. Louissaint's low comprehension of the English language a full plea colloquy was not held. NCPLS first interviewed and undertook to represent Mr. Louissaint after he had received an Order to Show Cause in a deportation proceeding from the Immigration and Naturalization Service.

Shortly thereafter, at Mr. Louissaint's request, the Department of Correction contacted a retired schoolteacher to see if she would teach him to read and write. In the school teacher's opinion, Mr. Louissaint did not know what was required for Basic Survival English.

NCPLS represented Mr. Louissaint at a state postconviction hearing. The Superior Court for the eighteenth judicial district found that the trial court's failure to advise Mr. Louissaint of the nature of the charge, and his right to plead not guilty amounted to reversible error and vacated the judgment. The state did not re-try Mr. Louissaint. He is now a productive civilian residing in Chapel Hill, North Carolina.

B. States have an affirmative duty to provide prisoners with meaningful access to the courts.

The district court's order was not an expansion of *Bounds*. On the contrary, the order merely effectuated the objective envisioned by this Court in the *Bounds* opinion. It is uncontroverted that *Bounds* imposes on prison authorities the affirmative duty to aid prisoners in the preparation of meaningful legal papers. *Bounds*, 430 U.S. 817, 828 (1977).

Nevertheless, Petitioners assert that: (1) the state does not have to take the next logical step of furnishing legal assistants to illiterate and non-English speaking inmates because the state has not created the impediment; and (2) the provision of a law library, by itself, conclusively satisfies constitutional muster, relieving a state of any other affirmative duty to provide inmate access to the courts.

This argument must fail for several reasons. First, the pre-*Bounds* cases dealt with state created impediments to a prisoners right of access. However, the Court in these earlier cases "did not attempt to set forth the full breadth of the right of access." *Id.* at 824. Moreover, even the pre-*Bounds* decisions have imposed some duty on the states "to shoulder affirmative obligations to assure all prisoners meaningful access to the courts." *Id.* (emphasis added).

These affirmative duties were imposed upon the states irrespective of the existence of a law library. For example,

indigent inmates must be provided with paper, pens, notary services and stamps, and states must forgo collection of docket fees otherwise payable to the treasury and expend funds for transcripts. *Id.* at 824-25. These affirmative duties do not dissipate upon creation of a law library. Similarly, irrespective of the existence of a law library, the states have an affirmative duty to assist illiterate and non-English speaking inmates in the filing of meaningful legal papers.

C. The mere existence of a prison law library does not relieve states of their affirmative duty to provide prisoners with meaningful access.

Petitioner's assertion that prison authorities are relieved of all responsibility upon establishment of law library misreads the purpose and scope of the right to access cases. The *Bounds* court held: "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate

law libraries or adequate assistance from persons trained in the law." *Id.* at 828. A law library standing alone is insufficient to provide illiterate and non-English speaking prisoners with meaningful access to the courts.

Moreover, this Court has long realized that a prisoner's right to access is not a static concept capable of rigid definition. Thus, in analyzing the constitutional touchstone in right to access cases, the Court has repeatedly stated the concept in adaptable terms such as "meaningful access" or "reasonable adequate opportunity." *Ross v. Moffitt*, 471 U.S. 611, 612, (1974) (meaningful access is the constitutional touchstone); *Bounds*, 430 U.S. 817, 825 (1977) ("whether law libraries or other forms of legal assistance are needed to give prisoners *a reasonably adequate opportunity* to present claimed violations of fundamental constitutional right to the courts.") (emphasis added). Illiterate and non-English speaking inmates are not afforded reasonably

adequate opportunities to present their claims, nor are they afforded meaningful access to the courts by the mere presence of a prison law library.

Respondents' reading of *Bounds* is in accord with the Sixth Circuit's analysis in *Knop v. Johnson*, 977 F.2d 966 (6th Cir. 1992), *cert. denied*, 479 U.S. 913 (1986). In *Knop* the court stated:

Standing alone, law libraries that are adequate for prisoners who know how to use them and who have reasonable physical access to their collections are not adequate for prisoners who cannot read and write English, or who lack the intelligence necessary to prepare coherent pleadings, or who, because of protracted confinement in administrative or punitive segregation or protective custody, may not be able to identify the books they need.

Id. at 1005-1006.

Moreover, Petitioner's reading of *Bounds* is in accord with other circuit opinions regarding a prisoner's right of access to the courts. *Cruz v. Hauck*, 627 F.2d 710, 721 (5th Cir. 1980) ("Library books, even if adequate in number,

cannot provide access to the courts for those persons who do not speak English or who are illiterate."); *Cody v. Hillard*, 599 F. Supp. 1025, 1061 ("a law library without more is not sufficient to enable prison inmates . . . unschooled in the basics of legal writing to prepare a petition or complaint"); *Glover v. Johnson*, 478 F. Supp. 1075, 1096 (E.D. Mich. 1979) (an adequate library "cannot provide meaningful aid to a prisoner unschooled in the most basic techniques of legal research"); *Canterino v. Wilson*, 562 F. Supp. 106, 108-112 (W.D. Ky. 1983), *cert. denied*, 110 S. Ct. 539 (1989) (mere access to an adequate legal library is unavailing to prisoners lacking sufficient intellectual ability to use the facility).

Petitioners also argue that non-English speaking and illiterate prisoners may ask for help from outside sources and any resulting burden to a prisoner is not of constitutional concern. This argument must fail because it ignores the rationale of the right to access cases. The *Bounds* decision

was premised on the acknowledgment that all prisoners, due to their status, are routinely precluded from enlisting assistance from outside sources that are available to free citizens.⁴

In reaching its holding, the *Bounds* court obviously realized the difficulty in accessing outside services for all inmates. It is anomalous to now assert, as Petitioners do, that it will be easier for non-English speaking or illiterate prisoners to access such services than it would be for English speaking literate prisoners. On the contrary, the burden of securing outside help for an illiterate or non-English speaking prisoner will be magnified due to his limited understanding

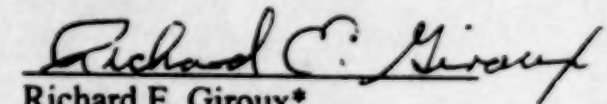
⁴Although *Bounds* did not specifically deal with the issue of illiterate and non-English speaking inmates, this Court was aware of that this class of individuals permeates the prison population. "Jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." *Johnson v. Avery*, 393 U.S. 483, 487 (1969).

of the English language. Accordingly, Arizona's illiterate and non-English speaking prisoners are entitled to legal assistance.

CONCLUSION

A prison law library, by itself, is of no help to an illiterate or non-English speaking prisoner. This court should affirm the court of appeals judgment.

Respectfully submitted,


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an attorney at law licensed to practice in the state of North Carolina and the U.S. Supreme Court and is a person of such age and discretion as to be competent to serve process.

That on the 27th day of September, 1995, he served a copy of the attached:

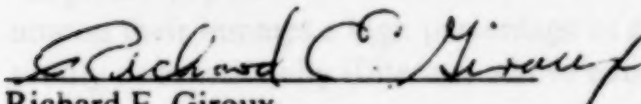
Brief of Amicus Curiae

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**BRIEF OF PRISONERS IN NORTHERN CALIFORNIA
CLASS ACTIONS AS AMICI CURIAE
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BRIEF OF PRISONERS IN
NORTHERN CALIFORNIA CLASS ACTIONS
AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICI CURIAE

Amici curiae are county, state and federal prisoner plaintiffs in four class action lawsuits pending in the United States District Court for the Northern District of California: Hayes v. Reno, No. C 93 2609 TEH (N.D. Cal.)(Alameda County California Santa Rita Jail); Madrid

v. Gomez, No. C 90 3094 TEH (N.D. Cal.)(California Department of Corrections Pelican Bay State Prison); Thompson v. Enomoto, 79-1630 SAW (N.D. Cal.)(California Department of Corrections San Quentin State Prison); and Toussaint v. McCarthy, 73-1422 SAW (N.D. Cal.)(California Department of Corrections Deuel Vocational Institution and Soledad State Prisons). Each case involves the prisoners' constitutional right of access to the courts through the provision of law libraries and the assistance of persons trained in the law.^{1/}

In Hayes, the district court has postponed trial, and in Madrid, the district court has postponed entering judgment on the plaintiffs' access to the courts claim, pending the decision in this case. In Thompson and Toussaint, the plaintiffs' access to law libraries and legal assistance is governed by a consent decree and a stipulated permanent injunction, respectively, which may be affected by the decision here.

Since indigent prisoners' right to the appointment of counsel at state expense for post conviction proceedings is not established,^{2/} amici curiae need law libraries and trained legal assistance in order to obtain access to the courts. Only through the use of prison law libraries and, in appropriate instances, the assistance of persons trained in the law can they adequately pursue habeas corpus and

^{1/} Pursuant to Supreme Court Rule 37.3, letters expressing the written consent of all parties to the filing of this brief have been filed with the Clerk.

^{2/} Coleman v. Thompson, 501 U.S. ___, 115 L.Ed.2d 640 (1991); Murray v. Giarantano, 492 U.S. 1 (1989); Pennsylvania v. Finley, 481 U.S. 551 (1987).

civil rights actions and thereby assert their rights to post-conviction relief and to humane conditions of confinement.

SUMMARY OF THE ARGUMENT

Many of the seminal prisoner rights cases decided by this Court in the last two decades were filed by prisoners pro se. See, e.g., Hudson v. McMillian, 503 U.S. 1, 117 L.Ed.2d 156 (1992); Bell v. Wolfish, 441 U.S. 520 (1979); Estelle v. Gamble, 429 U.S. 97 (1976). The ability of these prisoners to bring their cases to the attention of the federal courts was critical to the protection of their constitutional rights and to the development of a just and humane correctional system in this country.

Without the fundamental right of access to the courts, and the provision of law libraries and legal assistance guaranteed by Bounds v. Smith, 430 U.S. 817 (1977), many prisons nationwide would still be characterized as "a dark and evil world completely alien to the free world." Hutto v. Finney, 437 U.S. 678, 680 (1978).

In light of the fact that prisoners now face lengthy mandatory prison sentences, they must navigate a highly technical habeas corpus and post-conviction appeals process, and they must maneuver through the increasingly complex jurisprudence under 42 U.S.C. § 1983, the right of access to the courts is more critical today than at any time in the past. Moreover, there are significant collateral benefits to insuring prisoners' right of meaningful access to the courts.

The Court should uphold the grant of injunctive relief in this case, should strongly reaffirm Bounds v. Smith, and should clarify that prison authorities are required to provide that combination of law library access

and trained legal assistance that is necessary to ensure prisoners' right of meaningful access to the courts.

ARGUMENT

Petitioners concede that the fundamental right of access to the courts, set forth in Bounds v. Smith, 430 U.S. 817 (1977), remains as vital today as it was when Bounds was decided 18 years ago. Neither the Petitioners nor the amici in support of the Petitioners urge the Court to overrule or cut back on Bounds or to otherwise alter the constitutional framework established by that case. See Brief of Petitioners at 36 (Bounds establishes "the foundation for what is necessary to ensure inmates' access to the courts."); Brief Amicus Curiae of the Criminal Justice Legal Foundation at 4, 23 (Bounds governs prisoners' right of access to the courts); Brief of Amici Curiae Washington Legal Foundation, et al. at 15 (acknowledging Arizona's obligation to "comply with the mandate of Bounds"). Petitioners' acknowledgment of Bounds' continuing viability is clearly the correct view. Nothing in the years since Bounds was decided diminishes the constitutional and practical underpinnings of that decision.

While accepting the viability of Bounds, Petitioners' brief nonetheless conspicuously fails to include any substantive discussion of the record in this case, and fails to acknowledge that the district court conducted a trial and made detailed and numerous findings of fact. Instead, Petitioners argue that they should be free to implement Bounds by whatever means they choose, without court interference. This would practically nullify prisoners' right of access to the courts. If the spirit and effect of Bounds v. Smith is to be preserved, then the equitable relief granted by the district court must be affirmed.

- I. MANY OF THE SEMINAL PRISONER RIGHTS CASES DECIDED BY THIS COURT IN THE LAST TWO DECADES WERE FILED BY PRISONERS PRO SE; THE ABILITY OF THESE PRISONERS TO BRING THEIR CASES TO THE ATTENTION OF THE FEDERAL COURTS WAS CRITICAL TO THE PROTECTION OF THEIR FUNDAMENTAL CONSTITUTIONAL RIGHTS AND TO THE DEVELOPMENT OF FEDERAL LAW GOVERNING CONDITIONS OF CONFINEMENT.

As this Court has "'constantly emphasized,' habeas corpus and civil rights actions are of fundamental importance ... in our constitutional scheme' because they directly protect our most valued rights." Bounds v. Smith, 430 U.S. 817, 827 (1977). Indeed, prisoner petitions are "the first line of defense against constitutional violations." Id. at 828. See DeMallory v. Cullen, 855 F.2d 442, 446 (7th Cir. 1988) ("A prison inmate's right of access to the courts is the most fundamental right he or she holds.").

A review of the major prisoner rights cases decided by this Court in the last quarter century reveals that many of these cases began as prisoner pro se complaints. This demonstrates the essential role that pro se litigation has played in the development of this Court's prisoner related jurisprudence. The cases further illustrate the importance of law libraries and trained legal assistance in allowing prisoners to bring their claims, even in the most rudimentary form, and to defend their complaints against dismissal. See 28 U.S.C. § 1915(d); Fed. R. Civ. P. 12 and 56.

The fundamental constitutional right of access to the courts guarantees the right "to file cases raising claims that are serious and legitimate even if ultimately unsuccessful." Bounds, 430 U.S. at 826-27. To appreciate fully the impact that prisoner pro se litigation has had on prisoner rights jurisprudence, we will review representative cases decided by this Court. Although, the prisoner plaintiffs were not always victorious, the cases clarified the obligations facing the jailers as well as the rights of the prisoners, and they posed substantial constitutional claims. Moreover, "[d]efensive' measures taken in response to prisoner lawsuits have resulted in changes even though the suits were ultimately lost by the prisoner." Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 609, 639-40 n. 148 (1979). Indeed, the mere right of access to the courts, even if unexercised, can result in increased accountability and positive prison reform. Id. at 639 n. 146.

Major cases governing the application of the Cruel and Unusual Punishments Clause were initiated by prisoners acting pro se. Helling v. McKinney, 509 U.S. ___, 125 L.Ed.2d 22 (1993), for example, held that a complaint alleging constant exposure to secondary cigarette smoke states a valid Eighth Amendment claim for injunctive relief. The complaint, which alleged that plaintiff's cellmate smoked five packs of cigarettes a day, was filed pro se, and the plaintiff was pro se in the circuit court. McKinney v. Anderson, 959 F.2d 853 (1992); McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991). Rhodes v. Chapman, 452 U.S. 337 (1981), held that overcrowding may amount to cruel and unusual punishment, but that double celling is not per se unconstitutional. The complaint was filed pro se. Chapman v. Rhodes, 434 F. Supp. 1007, 1008 (S.D. Ohio 1977).

In Superintendent v. Hill, 472 U.S. 445 (1985), the Court held that due process judicial review of a lock-up placement decision is limited to determining whether there is some evidence in the record to support the prison administrator's placement decision. The case was instituted by the filing of two pro se complaints. Hill v. Superintendent, 466 N.E.2d 818, 819 (Mass. 1984). Hughes v. Rowe, 449 U.S. 5 (1980), held that even if a hearing accorded to a prisoner after placement in solitary confinement minimizes or eliminates any compensable harm resulting from the initial denial of procedural safeguards, a prisoner's constitutional claim that he was unjustifiably placed in segregation without a prior hearing is actionable. The plaintiff, who spent 10 days in solitary confinement, was pro se in the district and circuit courts and in the Supreme Court. Id., 449 U.S. at 8.

In Hudson v. McMillian, 503 U.S. 1, 117 L.Ed.2d 156 (1992), the Court addressed a correctional officer's use of excessive force and held that it may constitute cruel and unusual punishment even when the prisoner does not suffer serious injury. The plaintiff, who suffered punches "in the mouth, eyes, chest and stomach" that "cracked" his dental plate, "split his lower lip and loosened his teeth," was pro se in the district and circuit courts. Hudson v. McMillian, 929 F.2d 1014, 1015 (5th Cir. 1990).

The disciplinary rights of prisoners, and the concomitant powers of correctional officials, have also been addressed in cases brought by prisoners acting pro se. Bell v. Wolfish, 441 U.S. 520 (1979), held that maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of retained constitutional rights of both convicted prisoners and pretrial detainees. The case was originally filed pro se. United States ex rel. Wolfish v. United States, 428 F. Supp. 333, 334-35 (S.D.N.Y.

1977). Hutto v. Finney, 437 U.S. 678 (1978), established limitations on the use of disciplinary solitary confinement in harsh conditions. The individual and class cases were all filed pro se by plaintiffs who alleged truly medieval conditions of confinement. Holt v. Sarver, 309 F. Supp. 362, 364 (E.D. Ark. 1970); Holt v. Hutto, 363 F. Supp. 194, 198 (E.D. Ark. 1973); Finney v. Hutto, 410 F. Supp. 251, 253 (E.D. Ark. 1976). The district court found that "sometimes as many as 10 or 11 ... prisoners were crowded into windowless 8' x 10' cells [with] a toilet that could only be flushed from outside the cell. Although some prisoners suffered from infectious diseases such as hepatitis and venereal disease, mattresses were removed and jumbled together each morning, then returned to the cells at random each evening. Prisoners in isolation received fewer than 1000 calories a day; their meals consisted primarily of 4-inch squares of 'grue'..." Hutto, 437 U.S. at 682-83. And Wolff v. McDonnell, 418 U.S. 539 (1974), held that procedural due process is required in disciplinary hearings. The case was originally filed pro se. McDonnell v. Wolff, 342 F. Supp. 616, 617 (D. Neb. 1972).

The obligation of prison official to provide medical care and to protect inmates from harm has also been substantially established by prisoners acting without attorneys. In Estelle v. Gamble, 429 U.S. 97 (1976), the Court held that the government has an obligation to provide medical care to prisoners; the Eighth Amendment is violated if the prisoner demonstrates acts or omissions indicating deliberate indifference to serious medical needs. In that case, the state "totally failed to provide adequate treatment" of plaintiff's serious back condition, requiring him to work and punishing him for his complaints. Plaintiff was pro se in the district court. Gamble v. Estelle, 516 F.2d 937, 940, 941 (5th Cir. 1975). Farmer v. Brennan, 511 U.S. ___, 128 L.Ed.2d 811 (1994),

decided two Terms ago, clarified the showing necessary to sustain a prisoner's claim that a prison official failed to protect him from assault. Plaintiff, a transsexual who was beaten and raped by a fellow prisoner, was pro se in the district and circuit courts. Id., 128 L.Ed.2d at 821. And in Davidson v. Cannon, 474 U.S. 344 (1986), the Court held that an inmate, assaulted by a fellow inmate, is not deprived of due process when prison officials fail to prevent the assault; due process rights of a prisoner would be violated if the attack were perpetrated by prison guards, or if prison guards allowed an attack by a fellow prisoner to proceed. Plaintiff was pro se in the district court. Davidson v. O'Lone, 752 F.2d 817, 820 (3rd Cir. 1984).

Important prison First Amendment cases were similarly initiated by prisoners acting pro se. Two early First Amendment cases were each initiated by prisoners. Pell v. Procunier, 417 U.S. 817 (1974), held that media interviews with prisoners may be limited. Plaintiff was originally pro se in the district court, where the district judge observed that "[t]his case has its humble origins in a complaint drafted by a lay prisoner serving time at San Quentin." Hillery v. Procunier, 364 F. Supp. 196, 197 (N.D. Cal. 1973). Cruz v. Beto, 405 U.S. 319 (1972), held that causes of action were stated under the First and Fourteenth Amendments when Buddhist prisoners were denied benefits enjoyed by other prisoners and were punished because of the exercise of their religious beliefs. The complaint was filed pro se. Cruz v. Beto, 329 F. Supp. 443, 444 (S.D. Tex. 1970). Cooper v. Pate, 378 U.S. 546 (1964), held that a cause of action was stated when a prisoner claimed that he was denied privileges enjoyed by other prisoners solely because of his religious beliefs. Plaintiff was pro se in the district and circuit courts and in the Supreme Court. Id.; Cooper v. Pate, 324 F.2d 165 (7th Cir. 1963).

The visitation rights of prisoners were addressed in Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454 (1989), where the Court held that state regulations containing a nonexhaustive list of categories of prison visitors who may be excluded does not give prisoners a liberty interest in receiving visitors who are not members of the enumerated categories. Plaintiffs were originally pro se in the district court. Kedrick v. Bland, 541 F. Supp. 21, 22 (W.D. Ky. 1981), aff'd, 740 F.2d 432 (6th Cir. 1984); Thompson v. Kentucky Dept. of Corrections, 833 F.2d 614, 615 (6th Cir. 1987).

Parole and probation revocation is also governed by principles established in cases brought by prisoners acting pro se. Morrissey v. Brewer, 408 U.S. 471 (1972), held that due process requires a hearing before parole revocation, including written notice of the claimed violations, disclosure of evidence against the parolee, an opportunity to be heard and a detached hearing body. Plaintiff was pro se in the district court. Morrissey v. Brewer, 443 F.2d 942, 945 (8th Cir. 1971). In Montanye v. Haymes, 427 U.S. 236 (1976), the Court held that the Due Process Clause does not require a hearing prior to transfer of a prisoner to another institution for violation of prison rules. The complaint was filed pro se. United States v. Montanye, 505 F.2d 977, 979 (2d Cir. 1974). In Sandin v. Connor, 515 U.S. ___, 132 L.Ed.2d 418 (1995), decided last Term, the Court held that neither Hawaii prison regulations nor the Due Process Clause creates a liberty interest that would entitle prisoners to protections under the Fourteenth Amendment concerning disciplinary hearings. Plaintiff was pro se in the district and circuit courts. Connor v. Sakai, 15 F.3d 1463 (9th Cir. 1993). Similarly, California Dept. of Corrections v. Morales, 514 U.S. ___, 131 L.Ed.2d 588 (1995), holding that application of a California statute allowing a decrease in the frequency of parole suitability hearings does not violate the Ex Post

Facto Clause, was brought by a plaintiff who was pro se in the district and circuit courts. Morales v. California Dept. of Corrections, 16 F.3d 1001, 1002 (9th Cir. 1994).

Important cases governing procedure and remedies were also decided by the Court after prisoners filed pro se complaints. In Hardin v. Straub, 490 U.S. 536 (1989), the Court held that a federal court applying a state statute of limitations to a state prisoner's 42 U.S.C. § 1983 action is required to apply the state's statute tolling the limitations period for prisoners. The case originated with a pro se complaint alleging that for approximately 180 days in 1980 and 1981 plaintiff had been held in solitary confinement. Id. at 537. Castille v. Peoples, 489 U.S. 346 (1989), held that the federal habeas corpus requirement of exhaustion of state remedies is not satisfied by presentation of a new claim to a state's highest court on discretionary review. The case originated with a pro se petition. Id. at 347. And in Houston v. Lack, 487 U.S. 266 (1988), the Court held that a pro se prisoner's notice of appeal was timely at the moment of delivery to prison authorities for mailing to the court. Plaintiff was pro se for all of the district court proceedings and for part of the circuit court proceedings. Id. at 268-69.

Two major cases involving the interrelationship between habeas corpus principles and 42 U.S.C. § 1983 were initiated by prisoners without counsel. Wolff v. McDonnell, 418 U.S. 539 (1974), held that a section 1983 claim based on denial of due process must be exhausted in state court if the plaintiff seeks restoration of good time credits, but not if plaintiff seeks damages. The case was originally filed pro se. McDonnell v. Wolff, 342 F. Supp. 616, 617 (D. Neb. 1972). Similarly, Preiser v. Rodriguez, 411 U.S. 475 (1973), held that habeas corpus is the sole federal remedy of an inmate challenging the fact or duration of imprisonment, and exhaustion of state court

remedies is required. The case was originally filed pro se in the district courts. Rodriguez v. McGinnis, 307 F. Supp. 627 (N.D.N.Y. 1969); Kritsky v. McGinnis, 313 F. Supp. 1247 (N.D.N.Y. 1970).^{2/}

^{2/} A review of the major prisoner rights cases from the Ninth Circuit Court of Appeals similarly reveals that many of the cases began and were litigated pro se. In light of the vast prison populations in California and other states in the Ninth Circuit, cases from that circuit represent the course and significance of prisoner pro se litigation in the lower federal courts in the last 20 years:

A. The Substantive Rights of Prisoners

1. Cruel and Unusual Punishment:
Limitations on the State's Power to Punish

Jackson v. Arizona, 885 F.2d 639 (9th Cir. 1989) (allegations of unsanitary food handling and polluted water state a cause of action under the Eighth Amendment). The complaint was filed pro se and the plaintiff was pro se in the circuit court.

Akao v. Shimoda, 832 F.2d 119 (9th Cir. 1987), cert. denied, 485 U.S. 993 (1988) (allegation of overcrowding without more does not state an Eighth Amendment claim; however, allegations of increased stress, tension, communicable disease and violence from overcrowding could state a claim). Plaintiff was pro se in the district court. Id.

Balla v. Idaho State Bd. of Corrections, 656 F. Supp. 1108 (D. Idaho 1987) (prison overcrowding, requiring double and triple celling of some inmates
(continued...))

^{2/}(...continued)

constitutes unnecessary and wanton infliction of pain in violation of the Eighth Amendment), aff'd in part, rev'd in part, 869 F.2d 461 (9th Cir. 1989). Plaintiffs were pro se in the district court. 656 F. Supp. at 1109.

Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1992) (en banc) (prison policy allowing male guards to conduct clothed body searches of female prisoners was cruel and unusual punishment). The Plaintiff was pro se in the district court. Jordan v. Gardner, 953 F.2d, 1137, 1139 (9th Cir. 1992).

2. Treatment of Prisoners: The State's
Affirmative Obligations

Hunt v. Dental Dept., 865 F.2d 198 (9th Cir. 1989) (deliberate indifference to prisoner's severe dental problems states a claim under 42 U.S.C. § 1983). Plaintiff was pro se in the district and circuit courts. Id. at 199.

Bonner v. Lewis, 857 F.2d 559 (9th Cir. 1988) (failure to provide sign language interpreter to deaf inmate which serves to deny access to prison activities violates the Rehabilitation Act). Plaintiff was pro se in the district court. Id. at 561.

3. The First Amendment

Johnson v. Moore, 948 F.2d 517 (9th Cir. 1991) (prison need only provide inmates a reasonable opportunity to worship in accord with their conscience).
(continued...)

²/(...continued)

Plaintiff was pro se in the district and circuit courts. Id. at 517.

4. Access to the Courts

Ching v. Lewis, 895 F.2d 608 (9th Cir. 1990) (arbitrary denial of contact visits by prisoner's attorney violates right to meaningful access to the courts). Plaintiff was pro se in the district and circuit courts. Id. at 609.

Taylor v. List, 880 F.2d 1040 (9th Cir. 1989) (Sixth Amendment right to self-representation includes right to law books, witnesses and other tools necessary to prepare a defense). Plaintiff was pro se in the district and circuit courts. Id. at 1042.

Valandingham v. Bojorquez, 866 F.2d 1135 (9th Cir. 1989) (pro se prisoner has the right to undertake investigation and documentation of his claims in manner than an attorney would, subject to security and disciplinary requirements). Plaintiff was pro se in the district and circuit courts. Id. at 1136.

King v. Atiyeh, 814 F.2d 565 (9th Cir. 1987) (state must provide indigent prisoners with postage stamps to mail legal documents). Plaintiff was pro se in the district and circuit courts. Id. at 567.

B. The Rights of Pretrial Detainees

Thompson v. City of Los Angeles, 885 F.2d 1439 (9th Cir. 1989) (forced strip search of grand theft auto
(continued...))

²/(...continued)

arrestee at county jail does not constitute unlawful search because offense was sufficiently associated with violence). Plaintiff was pro se in district and circuit courts. Id. at 1441.

C. The Procedural Rights of Prisoners

1. Release and Forfeiture of Good Time Credits Before Release.

Bermudez v. Duenas, 936 F.2d 1064 (9th Cir. 1991) (a protected liberty interest in parole may be created by statute, regulations or public policies as long as specific, mandatory language is used). Plaintiff was pro se in the district and circuit courts. Id. at 1065.

Bergen v. Spaulding, 881 F.2d 719 (9th Cir. 1989) (state early release statutes can create liberty interests protected by due process guarantees). Plaintiff was pro se in the district and circuit courts. Id. at 720.

2. Maintenance of Records

Fendler v. United States Bureau of Prisons, 846 F.2d 550 (9th Cir. 1988) (Privacy Act requires Bureau of Prisons to maintain records with such accuracy as is reasonably necessary to ensure fairness). Plaintiff was pro se in the district and circuit courts. Id. at 551.

D. Jurisdiction, Procedure and Remedies

Puett v. Blandford, 912 F.2d 270 (9th Cir. 1990) (pro se prisoner is entitled to rely on United States
(continued...))

The breadth and scope of the constitutional issues addressed in each of the cases we have identified attest to the significance of pro se prisoner rights litigation. Ever since Clarence Earl Gideon hand-wrote his petition to this Court attacking his conviction on the ground that he was refused counsel, Gideon v. Wainwright, 372 U.S. 335 (1963),^{4/} the profound importance of pro se prisoner complaints in this country's constitutional jurisprudence has been well-known. "Some in forma pauperis cases have restructured the fundamental framework for our system of justice." McTeague v. Sosnowski, 617 F.2d 1016, 1019 (3d Cir. 1980). In the prison civil rights and habeas corpus context, pro se complaints and petitions have been responsible for changing the face of American correctional philosophy and for the establishment of a correctional system which properly reflects current standards of decency and humanity and acknowledges important constitutional restraints on the otherwise unrestricted power of prison authorities. Cf. Rhodes v. Chapman, 452 U.S. 337, 354 (1981)(Brennan, J., concurring) (emphasis in original) ("[T]he lower courts have learned from repeated investigation and bitter experience that judicial intervention is indispensable if constitutional dictates -- not to mention considerations of basic humanity -- are to be observed in the prisons.").

^{2/}(...continued)

Marshall for service of summons and complaint). Plaintiff was pro se in the district and circuit courts. Id. at 271.

^{4/} See A. Lewis, Gideon's Trumpet (1964) at 4.

Without the fundamental right of access to the courts, guaranteed by Bounds v. Smith, these cases could not have been brought. Prisons would be even more crowded. Rhodes v. Chapman, 452 U.S. 337 (1981). Prisoners would face the constant threat of physical brutality, unreasonable body cavity searches and forced blood tests, and illegal solitary confinement. Hudson v. McMillian, 503 U.S. 1, 117 L.Ed.2d 156 (1992); Hutto v. Finney, 437 U.S. 678 (1978); Bell v. Wolfish, 441 U.S. 520 (1979); Walker v. Sumner, 917 F.2d 382 (9th Cir. 1990). Prison officials would discipline prisoners without the constraints of due process. Wolff v. McDonnell, 418 U.S. 539 (1974). Prison doctors would deliberately ignore the serious medical needs and pain and suffering of prisoners in their care. Estelle v. Gamble, 429 U.S. 97 (1976). Disabled prisoners would be denied access to rehabilitative activities. Bonner v. Lewis, 857 F.2d 559 (9th Cir. 1988). Religious prisoners would be punished because of the exercise of their religious beliefs. Cruz v. Beto, 405 U.S. 319 (1972); Cooper v. Pate, 378 U.S. 546 (1964). And prisoners would face illegal parole revocation without hearings or other requirements of due process. Morrissey v. Brewer, 408 U.S. 471 (1972).

For the past 20 years, the exercise of prisoners' meaningful right of access to the courts has been the single most important driving force behind the protection of their "most valued rights." Bounds v. Smith, 430 U.S. at 827. The cases noted above, and hundreds more like them throughout the United States, have truly been "the first line of defense against constitutional violations." Id. at 828. Without meaningful court access, made possible by the

proper combination of libraries and legal assistance,^{2/} it is certain that prisoners throughout this country would be suffering profoundly inhumane and cruel conditions, and that epidemic violation of their constitutional rights would be the norm.

The arguments that prisoners do not require adequate law libraries or adequately trained legal assistance (1) because "[i]t requires relatively little research to bring to a court's attention a claim that a fundamental right has been violated," Brief Amicus Curiae of the Criminal Justice Legal Foundation at 15, or (2) because "inmates engaged in pro se litigation ... need only identify the general nature of their claims and the alleged facts supporting them," Brief of Petitioners at 24, are refuted by common sense and by the clear holding of Bounds v. Smith. First, the immense complexity of the constitutional claims alleged in prisoner rights cases refutes the naive assertion that "relatively little research" is required to bring these claims. The statement that "the classics of constitutional law are well-known and readily found through elementary research," and that therefore only a "very limited library" is required, Brief Amicus Curiae of the Criminal Justice Legal Foundation at 15, could only be made by someone with little experience in constitutional litigation. If the

^{2/} Our position is not that legal assistance is required for all prisoners. Rather, consistent with the injunction in this case, legal assistance should be provided to prisoners who, "because of language factors or lack of access to the law library, or for other reasons, are unable to perform adequate legal research and writing." Casey v. Lewis, 43 F.3d 1261, 1271 (9th Cir. 1994) (citing permanent injunction at 11). Prison authorities may satisfy their constitutional obligations by providing direct access to adequate law libraries for all other prisoners.

issues were so simple, these cases would not have occupied the time and attention of this Court and the lower federal and state courts, and would not have resulted in the issuance of countless majority and dissenting opinions.

Second, this Court in Bounds considered and explicitly rejected the argument, made by Petitioners here, that access to legal materials and assistance is not necessary because habeas corpus petitions and civil rights complaints need only set forth facts giving rise to the cause of action. "[I]t hardly follows that a law library or other legal assistance is not essential to frame such documents." Bounds, 430 U.S. at 825. The Court noted that "[i]t would verge on incompetence" for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, and the types of relief available. Id. "Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action." Id.

If a lawyer must perform such preliminary research, it is no less vital for a pro se prisoner. Indeed, despite the "less stringent standards" by which a pro se pleading is judged, it is often more important that a prisoner complaint set forth a nonfrivolous claim meeting all procedural prerequisites, since the court may pass on the complaint's sufficiency before allowing filing in forma pauperis and may dismiss the case if it is deemed frivolous.

Id., at 825-26 (footnote and citations omitted). See 28 U.S.C. §1915(d).⁴⁷

Not only do prisoners require legal materials and assistance in order to set forth legitimate claims for relief, such materials and assistance are critical to ensuring that prisoner's claims make it past the pleading stage. In defending a motion to dismiss or for summary judgment on qualified immunity grounds, for example, a pro se plaintiff absolutely requires access to a prison law library or to trained legal assistance in order to prove that the facts alleged in the complaint show a violation of "clearly established law." Johnson v. Jones, 515 U.S. ___, 132 L.Ed.2d 238, 246 (1995). Similarly, a prisoner attempting to avoid summary dismissal of his petition for habeas corpus must be able to research and challenge the States "seemingly authoritative citations" and to "rebut the State's argument." Bounds, 430 U.S. at 826. It is grossly unfair if the state attorneys have access to a law library, and the prisoner does not.

The complexity of civil rights complaints and habeas corpus petitions requires that prisoners be provided with that combination of law books and legal assistance necessary to properly frame their complaints, to avoid

⁴⁷ Given the sheer number of prisoners nationwide, and the number of corresponding prisoner cases filed with the courts, the time has long since passed when a hand-scrawled, illegible and uneducated petition can catch the attention of a court and result in the granting of relief or even a considered decision denying relief. The present day reality is that, "[w]ithout a library or legal assistance ... valid claims will undoubtedly be lost." Bounds, 430 U.S. at 828 n. 16.

summary dismissal, and to achieve meaningful access to a judicial forum.

II. IN LIGHT OF THE FACT THAT PRISONERS NOW FACE EXTREME MANDATORY CRIMINAL PENALTIES, AND MUST NAVIGATE A HIGHLY TECHNICAL HABEAS CORPUS AND POST-CONVICTION APPEALS PROCESS, THEIR RIGHT OF ACCESS TO THE COURTS IS MORE CRITICAL TODAY THAN AT ANY TIME IN THE PAST.

Since Bounds v. Smith was decided in 1977, mandatory minimum sentences required by the United States Sentencing Guidelines and state laws, and state and federal "three strikes" sentencing requirements, have dramatically changed the landscape that defines the punishment of criminal defendants. See, e.g., 18 U.S.C. § 3559(c) (conviction for third serious violent felony results in life imprisonment); Cal. Penal Code § 667(e) (conviction for third felony results in indeterminate term of life imprisonment).

Under "'three strikes and you're out' (or more precisely 'three strikes and you're in') legislation, ... a single current offense can (without encroaching on the Ex Post Facto Clause) visit previously-undreamed-of severity on a defendant whose past includes two convictions that did not carry a price tag even approaching what the new law has now prescribed." United States v. Bailey, 892 F.Supp. 997, 1020 (N.D. Ill. 1995). "[T]he failure of the Sentencing Guidelines to provide certainty in sentencing has given rise to the proliferation of mandatory minimum sentences. [However,] [s]ince no sentencing certainty is to be found in mandatory minimum sentencing either, we

careen on to 'three strikes and you're out' and an expanded list of crimes carrying the death penalty. Where will it end?" United States v. Angiulo, 852 F. Supp. 54, 60 n.10 (D. Mass. 1994), aff'd, 57 F.3d 38 (1st cir. 1995).

The extreme severity of current federal and state mandated sentences demands that prisoners be provided with a meaningful right of access to the courts. The greater the penalties, the greater the need to ensure that only the guilty are punished and that only legally appropriate punishments are inflicted.

Similarly, since Bounds was decided, habeas corpus proceedings have become extraordinarily complex; prisoners seeking post-conviction relief face a minefield of procedural requirements, and one misstep can forever bar them from relief. Given this reality, the right of access to the courts, made possible through the provision of law libraries and legal assistance, is more essential than ever to ensuring that the writ truly remains "the first line of defense against constitutional violations." Bounds, 430 U.S. at 826.

The Court has recognized that "[t]he writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." Harris v. Nelson, 394 U.S. 286, 290-91 (1969). It is the procedure for resolving "all dispositive constitutional claims presented in a proper procedural manner." McCleskey v. Zant, 499 U.S. 467, 479, (1991). The Court's reverence for and protection of the writ of habeas corpus mandates that prisoners be guaranteed access to the courts to seek such relief. Indeed, prisoners' need for access to the courts through the provision of legal materials and trained legal assistance is especially critical in light of the Court's decision in McCleskey, where the court held that a prisoner is barred

from asserting a constitutional claim in a subsequent federal habeas corpus proceeding if he did not raise the claim in his initial federal application and cannot show either good cause for failing initially to raise the claim and prejudice resulting from such failure, or that a fundamental miscarriage of justice would result if the claim were not entertained.

In light of McCleskey, "a prisoner applying for habeas corpus relief in federal court must assert all possible violations of his constitutional rights in his initial application or run the risk of losing what might be a viable claim. This is a substantial burden." Brown v. Vasquez, 952 F.2d 1164, 1167 (9th Cir. 1991), cert. denied, 503 U.S. 1011 (1992). Compounding this burden, the petitioner "must decipher a complex maze of jurisprudence in order to determine which of his constitutional rights, if any, may have been violated." Id. Such a task is "difficult even for a trained lawyer to master," and is often beyond the abilities of most prisoners. Murray v. Giarratano, 492 U.S. 1, 28 (1989) (Stevens, J. dissenting).

While we recognize that many prisoners are illiterate and poorly educated, and that the provision of law libraries and assistance will not erase entirely the inherent inequities of a system in which untrained prisoners must bring their own complex claims for post conviction relief without the assistance of counsel, an expansive right of access to the courts in this context is both practically and constitutionally required. Indeed, it is as true today as it was when Bounds was decided that, "[w]ithout a library or legal assistance ... valid claims will undoubtedly be lost." Bounds, 430 U.S. at 828 n. 16. "We should not romanticize what even a jailhouse lawyer, much less a poorly-educated inmate, can accomplish by rummaging for a few hours in a limited collection.... But as long as one prisoner is unjustly detained or one prisoner maltreated a

life line to the courts is precious. In the context of this case the ... prisoners' library is part of the lifeline." Toussaint v. McCarthy, 926 F.2d 800, 803-04 (9th Cir. 1990).

III. THERE ARE SIGNIFICANT COLLATERAL BENEFITS TO ENSURING PRISONERS' RIGHT OF MEANINGFUL ACCESS TO THE COURTS THROUGH THE PROVISION OF LAW LIBRARIES AND TRAINED LEGAL ASSISTANCE.

Not only is a meaningful right of access to the courts constitutionally required, but the provision of access through the availability of legal materials and assistance results in a diminution in the number of groundless complaints and incomprehensible habeas petitions, and in significant collateral benefits to all stakeholders in the prisoner litigation context -- the prisoners, prison authorities, the public and the courts. Even the state defendants in Bounds argued that adequately assisted prisoner litigants will be less likely to file frivolous petitions and complaints. Seeking a grant to fund the court-approved library plan, they stated:

[T]he ultimate result ... should be a diminution in the number of groundless petitions and complaints filed.... The inmate himself will be able to determine to a greater extent whether or not his rights have been violated and judicial evaluation of the petitions will be facilitated.

Bounds, 430 U.S. at 821 (quotations omitted).

The Court agreed with these arguments, and noted the additional benefits that would accrue from the provision of a formal legal assistance program, which would "result in more efficient and skillful handling of prisoner cases...." Id. at 831. "Independent legal advisors can mediate or resolve administratively many prisoner complaints that would otherwise burden the courts, and can convince inmates that other grievances against the prison or the legal system are ill-founded...." Id.

The commentators and lower federal courts have come to the same conclusion -- that prison legal assistance programs discourage the filing of frivolous claims and promote the administrative resolution of prisoner grievances, thereby reducing the volume of prisoner litigation. As one district court put it: "[M]any inmates, unversed in the law as they are, are unable to know they even have a colorable claim, let alone how to frame it properly as a cause of action, unless they first have access to adequate legal resources or advice." Reutke v. Dahm, 707 F. Supp. 1121, 1129 (D. Neb. 1988). See also Bluth, Legal Services for Inmates: Coopting the Jailhouse Lawyer, 1 Cap. U. L. Rev. 59, 62 (1972) (Prisoners "without meritorious cases were often the ones most in need of reliable legal advice."); Turner, 92 Harv. L. Rev. at 636 ("There is no evidence that providing counsel for prisoners encourages the filing of suits. Indeed, many believe that the availability of in-prison counseling reduces the volume of litigation."); id. ("[C]ases that are filed with legal assistance are more likely to be meritorious, to pose the precise issue and relief sought, and to contribute to judicial efficiency by relieving the courts of their deciphering-screening burden.").

There is also little doubt that, while the provision of adequate law libraries and formal legal assistance programs does not eliminate the filing of all imperfect habeas

petitions, a reduction in prisoners' meaningful right of access to legal resources would exacerbate already profound problems faced by the federal judiciary. The product of unassisted prisoners "is often a confusing and incomprehensible amalgam of claims which not only fails to protect the prisoner, but which ties up valuable court time in the inevitable struggle to comprehend what it is that is being alleged." Brown, 952 F.2d at 1167. Indeed, this Court has recognized "the problems in judicial administration caused by the surfeit of meritless in forma pauperis complaints in the federal courts, not the least of which is the possibility that meritorious complaints will receive inadequate attention or be difficult to identify amidst the overwhelming number of meritless complaints." Neitzke v. Williams, 490 U.S. 319, 326 (1989). See also Johnson v. Avery, 393 U.S. 483, 488 (1969); Murray, 492 U.S. at 29-30 (Stevens, J., dissenting).

The provision of access to the courts through the availability of legal materials and trained legal assistance reduces the number of groundless complaints and incomprehensible habeas petition. Cutting back on the right of access will have the opposite effect, and will harm not only the prisoner litigants, but the courts and the public.

CONCLUSION

The right of access to the courts is critical to the protection of prisoners' other fundamental constitutional rights, is essential to prisoners' ability to bring highly technical habeas corpus petitions, appeals, and civil rights claims, and reduces the number of frivolous prisoner complaints and petitions.

We urge the Court to affirm the district court injunction and to reaffirm the vitality of Bounds v. Smith.

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